No. 77-256

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

TIGER INTERNATIONAL, INC. AND
THE FLYING TIGER LINE INC., PETITIONERS

v.

CIVIL AERONAUTICS BOARD

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CITATIONS

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Tiger International, Inc. and The Flying Tiger Line Inc. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App. A, *infra*) is officially reported at 554 F.2d 926.

JURISDICTION

The judgment of the court of appeals (App. A, *infra*) was entered on May 18, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an order of the Civil Aeronautics Board issued without a hearing is to be reviewed under the statutory "substantial evidence" standard or under the "arbitrary or capricious" standard applied by the court of appeals despite the clear statutory language.

2. Whether an order of the Civil Aeronautics Board is immune from jurisdictional challenge in a timely court of appeals proceeding to challenge a later and integrally related order simply because the 60 day statutory review period has already expired with respect to the prior order.

STATUTES INVOLVED

The relevant provisions of the Federal Aviation Act of 1958, as amended (the "Act"), 49 U.S.C. 1301 *et seq.*, are as follows:

> Sec. 401(h), 49 U.S.C. 1371(h). No certificate may be transferred unless such transfer is approved by the Board as being consistent with the public interest.
>
> Sec. 408(a)(5), 49 U.S.C. 1378(a)(5). It shall be unlawful unless approved by order of the Board as provided in this section—
>
> * * * *
>
> (5) For any air carrier or person controlling an air carrier, any other common carrier, any person engaged in any other phase of aeronautics, or any other person to acquire control of any air carrier in any manner whatsoever. . . .
>
> Sec. 408(b), 49 U.S.C. 1378(b). Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe . . . Provided further, That, in any case in which the Board determines that the transaction which is the subject of the application does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction.
>
> Sec. 1005(f), 49 U.S.C. 1485(f). Every order of the . . . Board shall set forth the findings of fact upon which it is based. . . .
>
> Sec. 1006(a), 49 U.S.C. 1486(a). Any order, affirmative or negative, issued by the Board . . . under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in Section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States

Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Sec. 1006(e), 49 U.S.C. 1486(e). The findings of facts by the Board . . ., if supported by substantial evidence, shall be conclusive . . . .

STATEMENT

On July 23, 1969 The Flying Tiger Line Inc., the predecessor of the present petitioners, submitted to the Board a plan for reorganization under which a holding company would be formed, now Tiger International, Inc. ("TI"), which would own a reconstituted The Flying Tiger Line Inc. ("FTL") and would diversify into non-air carrier enterprises through the creation or acquisition of new subsidiaries. The application requested the Civil Aeronautics Board ("Board") to disclaim jurisdiction over the plan to reorganize The Flying Tiger Line Inc. as a holding company but to approve the transfer of certificates of public convenience and necessity to the new FTL operating company to be formed under the plan.[1]

By tentative order, 69-12-121, adopted December 29, 1969 and final order, 70-6-119, adopted May 5, 1970 ("Reorganization Order"), the Board declined to disclaim jurisdiction and approved the reorganization plan under §408(a), 49 U.S.C. 1378(a), with certain conditions; it also approved the transfer

[1] The Flying Tiger Line Inc. took the position that the Board had no jurisdiction under § 408(a), 49 U.S.C. 1378(a), since no acquisition of control was involved, there being merely a reordering of existing interests. *See County of Marin* v. *United States*, 356 U.S. 412 (1956). It was clear, however, that Board approval for the transfer of certificates from The Flying Tiger Line Inc. to the reconstituted FTL was required under § 401(h), 49 U.S.C. 1371(h).

of certificates under §401, 49 U.S.C. 1371. Board approval of the reorganization plan under §408(a), 49 U.S.C. 1378(a), was made contingent upon petitioners' express, written acceptance of these conditions, which was duly given.[2] Among the conditions was a requirement that the holding company, i.e. TI, and its non-airline subsidiaries could not enter into any intercompany transactions with or affecting the air carrier subsidiary, FTL, in an amount now aggregating $1,000,000 or more annually, without obtaining prior Board approval.[3]

Pursuant to this requirement for Board approval of intercompany transactions FTL submitted for Board approval the tax allocation agreement which was the subject of review in the court of appeals. Under the tax allocation agreement as proposed TI would have been free to allocate tax savings among its various subsidiaries, including FTL, while at the same time assuring to FTL treatment at least as favorable as if FTL had filed a tax return as an independent entity. By Order 73-12-106, adopted December 26, 1973 the Board refused to approve the agreement as submitted and required a change in the terms thereof which resulted in FTL's being treated more favorably for tax purposes than would have been the case if it had filed a tax return as an independent company and even more favorably than under the proposed agreement. TI and FTL petitioned the Board for reconsideration, which was denied by Order 75-2-1, adopted February 2, 1975 (together with Order 73-12-106 the "Tax Allocation Orders"). Thereupon, TI and FTL filed a petition for review in the court of appeals.

[2] The court of appeals was cognizant of the dilemma which TI and FTL found themselves in under which Board approval of the reorganization plan was presented as an all-or-nothing proposition. They could accept the conditions or stop the reorganization and petition for review. As a practical matter they could not both reorganize and petition for review. *See App. A, infra*, at n. 12 and accompanying text.

[3] Initially the amount was $100,000, which was increased to $1,000,000 by Board Order 74-5-90, adopted May 17, 1974.

Before the court of appeals TI and FTL argued that the Board did not have jurisdiction to impose conditions pursuant to § 408(a), 49 U.S.C. 1378(a), upon approval of the reorganization plan in 1970. Because it did not have such jurisdiction, the argument continued, TI and FTL should not have been required to submit the tax allocation agreement to the Board in 1973. The Tax Allocation Orders consequently were nullities. Without reaching the merits of this claim the court of appeals held that it was without jurisdiction to pass upon it because the sixty day review period for review of the 1970 order prescribed by § 1006(a), 49 U.S.C. 1486(a), had long since elapsed.

TI and FTL also argued that the Board's rejection of the tax allocation agreement was not supported by substantial evidence, the standard of review prescribed by § 1006(e), 49 U.S.C. 1486(e), because the proposed agreement treated the airline at least as favorably as if it had been an independent entity. The court of appeals ruled that since no hearing had been held the substantial evidence test prescribed by § 1006(e), 49 U.S.C. 1486(e), did not apply. Instead the court applied the arbitrary or capricious test and, according "wide deference" to the expertise of the Board, it found under that test that the Board's action was not irrational. The court noted that its rejection of the statutory substantial evidence test placed it in conflict with other circuits and the plain wording of the Act and intimated that application of the substantial evidence test might have produced a different result.

REASONS FOR GRANTING THE WRIT

The decision of the Ninth Circuit in this case to apply the "arbitrary or capricious" standard of review for Board orders in non-hearing cases instead of the "substantial evidence" standard is in direct conflict with decisions of the First, Eighth and District of Columbia Circuits. Moreover, as the court of appeals itself recognized, its decision ignores the plain language of the Federal Aviation Act which requires that *every* order of the Board, whether issued with or without a hearing, shall be

supported by findings of fact which shall be conclusive "if supported by substantial evidence." The court of appeals in part justified its departure from the requirements of the statute and from the decisions of three other circuits on the basis of this Court's decision in *Camp* v. *Pitts,* 411 U.S. 138 (1973). However, in *Camp* v. *Pitts,* this Court did no more than to apply the Administrative Procedure Act ("APA"), 5 U.S.C. 701, prescription of an "arbitrary or capricious" standard of review to a non-hearing matter where such application was clearly called for by the applicable statutes. *Camp* v. *Pitts* does not justify the Ninth Circuit's total disregard of a statutorily mandated standard in a wholly different context, and the misunderstanding and misapplication of that opinion must be corrected by this Court. The Board in calendar 1976 issued almost 2,000 orders, but only 97 matters were set down for hearing during this period.[4] If allowed to stand, the Ninth Circuit's standard of review would permit the Board, merely by continuing to exercise its broad discretion not to hold hearings in many cases, to immunize its orders from judicial review far more successfully than it can under the statutorily prescribed substantial evidence test.

As for the Ninth Circuit's refusal to consider the jurisdictional issue, it flies directly in the face of the established principle that an unlitigated question of subject matter jurisdiction, particularly one involving a question whether an agency has acted beyond the scope of its statutory authority, cannot be foreclosed from collateral attack merely because one chal-

[4] There is obviously no precise correlation between orders issued in a particular year and matters set down for hearing during that year. Not every matter set down for hearing actually reaches the hearing stage, and if a matter does, any resulting orders might issue only in a subsequent year. Further, a particular matter for which a hearing is held may generate several procedural and interlocutory orders prior to a final order on the merits. For example, during the first nine months of 1976, 1,464 orders were issued by the Board. Of these, 134 involved matters in which there were hearings, including 51 orders involving decisions on the merits in matters in which there were hearings. The pattern of these figures together with the great disparity between the number of orders issued and the number of matters set down for hearing suggests that a substantial majority of Board orders on the merits of a particular matter are issued without there having been a hearing.

lenging the agency's action has failed precisely to follow the applicable statutory review procedure. The public interest in holding an agency to its statutory authority is important enough, and the principle that a court will not decline, merely because an aggrieved party has failed to follow the statutory procedure, to consider whether an agency has exceeded that authority is so well established by decisions of this and the lower federal courts, that review is required by this Court to correct the Ninth Circuit's departure from such important, established principles.

1. The court of appeals acknowledged in its opinion that "[b]oth legislation and case law from outside this circuit provide some support for the substantial evidence standard." *App. A* p. 14a. The court cited the provisions of § 1006(e), 49 U.S.C. 1486(e), which read in part: "The findings of facts by the Board . . ., *if supported by substantial evidence*, shall be conclusive." (Emphasis added by court of appeals.) *App. A* pp. 14a, 15a. It went on to note the words of § 1005(f), 49 U.S.C. 1485(f), which provides in part: "Every order of . . . the Board shall set forth the *findings of fact* upon which it is based . . ." (Emphasis added by court of appeals.) *App. A*, p. 15a. However, after setting forth this clearly applicable statutory language, the court proceeded to dismiss its importance in a footnote which simply recited the fact that the judicial review provisions cited above date back to the original Civil Aeronautics Act of 1938 under which all cases arising under what is now § 408, 49 U.S.C. 1378, required a hearing. *App. A*, n.17. The court then noted that in 1960 Congress amended § 408, 49 U.S.C. 1378, to permit the Board to act in certain cases without a hearing and that in this case the Board acted pursuant to this amendment.[5] The court failed completely to deal with the fact

[5] One of the conditions of the proviso, all of which must be met, is that the Board determine that the transaction which is the subject of the application "does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation." One glaring, ironical inconsistency in this matter is that the Board asserted jurisdiction under § 408(a), 49 U.S.C. 1378(a), on the basis that the proposed reorganization involved the control of an air carrier directly engaged in the operation of aircraft in air transportation yet was able to make the determination under § 408(b), 49 U.S.C. 1378(b), that a hearing was not required. *See County of Marin* v. *United States, supra.*

that Congress did not in 1960 or subsequently amend the judicial review provisions of the Act in any manner here relevant.

The court appears to have concluded that Congress in effect overlooked the statutory review provision in making this amendment and would have provided for an arbitrary or capricious standard of review had it focused on the matter. Not only is this an impermissible, revisionist method of construing or judicially amending a statute, but the reasoning is wholly specious.

The court would have one believe that all Board matters prior to the 1960 amendment to § 408(b), 49 U.S.C. 1378(b), were to be decided only after hearings and on a hearing record, hence the universally applicable substantial evidence review standard. In fact, after the comprehensive revision of aviation legislation undertaken by the Congress in 1958, there were many statutory provisions making matters subject to Board decision which did and do not require a hearing but which were and are, of course, subject to the generally applicable substantial evidence review provision.[6] Other provisions of the statute did and do require a hearing prior to Board action.[7] The carefully considered statutory scheme enacted by Congress in 1958 and essentially still intact thus contains a mix of matters upon which the Board may issue orders, some after a hearing

[6] *See, e.g.*, §401(h), 49 U.S.C. 1371(h) (transfer of certificate of public convenience and necessity); §402(g), 49 U.S.C. 1372(g) (transfer of foreign air carrier's permit); §409, 49 U.S.C. 1379 (interlocking relationships); §410, 49 U.S.C. 1380 (financial aid to air carriers); §412, 49 U.S.C. 1382 (pooling agreements); and §416, 49 U.S.C. 1386 (classification and exemption of carriers except provisions concerning compliance with labor legislation).

[7] *See, e.g.*, §401(c), 49 U.S.C. 1371(c) (application for certificate of public convenience and necessity); §401(g), 49 U.S.C. 1371(g), (alteration, amendment, modification, suspension, or revocation of a certificate of public convenience and necessity); §401(j), 49 U.S.C. 1371(j) (abandonment of a certificated route); §402(f), 49 U.S.C. 1372(f) (alteration, modification, amendment, suspension, cancellation, or revocation of a foreign air carrier's permit); §406(a), 49 U.S.C. 1376(a) (rates for transportation of mail); §408(b), 49 U.S.C. 1378(b), unless the third proviso is applicable (consolidation, merger, or acquisition of control); and §411, 49 U.S.C. 1381 (cease and desist orders relating to unfair methods of competition).

and others without a hearing. But all are subject to the substantial evidence standard of review prescribed by §§ 1005(f) and 1006(e), 49 U.S.C. 1485(f), 1486(e). Given this pattern of the statute both before and after the 1960 amendments, there simply was no ground for the court of appeals to have concluded that Congress' action was inadvertent in not providing a different standard of review after the 1960 amendment to § 408(b), 49 U.S.C. 1378(b), dispensing with the requirement for hearing under § 408, 49 U.S.C. 1378, in certain instances.

In accordance with the clear wording of the Act, the courts of appeals in the First, Eighth and District of Columbia Circuits have all applied the substantial evidence test on review of non-hearing Board actions: *Pillai* v. *CAB*, 485 F.2d 1018 (D.C. Cir. 1973); *Law Motor Freight, Inc.* v. *CAB*, 364 F.2d 139 (1st Cir. 1966), *cert. denied*, 387 U.S. 905 (1967); *Railway Express Agency, Inc.* v. *CAB*, 345 F.2d 445 (D.C. Cir.), *cert. denied*, 382 U.S. 879 (1965); and *Nebraska Dept. of Aeronautics* v. *CAB*, 298 F.2d 286 (8th Cir. 1962).

The Ninth Circuit declined to follow its sister circuits in applying the statutory standard and concluded that a substantial evidence standard of review is a matter of judicial choice in non-hearing administrative actions on the basis of this Court's decision in *Camp* v. *Pitts*, 411 U.S. 138 (1973). However, the "critical difference" between review of a hearing record and review in a case where no hearing was held which the court of appeals said it discerned in *Camp* v. *Pitts, App. A*, p. 17a, was nothing more than a straightforward application of the plain language of the APA.

Camp v. *Pitts* dealt with "a narrow, but substantial, question with respect to the proper procedure to be followed when a reviewing court determines that an administrative agency's stated justification for informal action does not provide an adequate basis for judicial review." 411 U.S. at 138. The case involved the denial of an application for a new bank charter subject to review under the Administrative Procedure

Act ("APA"), 5 U.S.C. 701. The posture of the case before this Court was that the basis for the Comptroller's decision was not stated with sufficient clarity to permit judicial review. Further, neither the National Bank Act nor the APA required the Comptroller to hold a hearing or to make formal findings on the hearing record when passing on applications for new banking authorities.

In this context, this Court held that "the proper standard for judicial review of the Comptroller's adjudications is not the substantial evidence test which is appropriate when reviewing findings made on a hearing record, 5 U.S.C. § 706(2)(E)." 411 U.S. 138, 141. Instead, the Court held that the appropriate standard for review was "whether the Comptroller's adjudication was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' as specified in 5 U.S.C. § 706(2)(A)." 411 U.S. 138, 142. Thus, this Court was making a determination as to which of two standards of review prescribed by the APA was applicable. This is a wholly different matter from enunciating a rule, as did the court of appeals in the instant case, that, notwithstanding the plain language of the applicable statutory review provisions prescribing a substantial evidence test, an arbitrary or capricious test will, by judicial fiat, be applied in the review of non-hearing matters.

The sole policy basis adduced by the court for not applying the statutory standard was the thoroughly cynical observation that in uncontested, non-hearing matters the Board would be forced on its own motion to order a hearing or otherwise introduce into the record a quantum of evidence contrary to the applicant's position sufficient to preserve to itself the option of ruling against an applicant and having such a ruling sustained on appeal.

The implications of the court of appeals' decision to depart from the statutory review standard are far reaching. All Board orders under § 408, 49 U.S.C. 1378, issued without a hearing are, under the court of appeals' theory, now subject to a new

standard of review, one which the court implicitly acknowledges gives Board action considerably greater protection from court challenge than the substantial evidence test. The court intimated that had the substantial evidence test been applied a different outcome would have resulted. Further, there is no reason why the court of appeals' theory would not be applicable to all non-hearing decisions issued by the Board, which likely include a substantial majority of Board decisions on the merits. *See* n.4, *supra*. Such a significant change in a judicial review system ought to be made by the Congress, not the courts.

2. The court of appeals erred in holding that it did not have the power to review the 1970 Reorganization Order, in particular the Board's assumption of jurisdiction over The Flying Tiger Line's reorganization under § 408(a) of the Act, 49 U.S.C. 1378(a). The court undisputedly had the power to review the 1973 Tax Allocation Orders, and these orders were fundamentally dependent on the validity of the Reorganization Order. In holding that it did not have the power to examine the Reorganization Order, the court of appeals acted contrary to the settled principle that an unlitigated question of subject matter jurisdiction is not foreclosed to a court which otherwise is seized of jurisdiction.

Petitioners submit that § 1006(a), 49 U.S.C. 1486(a), and similar review statutes prescribe nothing beyond the normal procedure for obtaining review of agency rulings made within the general scope of the agency's statutory authority. However, where an agency has acted beyond the scope of its statutory authority its action is a complete nullity and the party adversely affected by the agency's *ultra vires* action is not limited to the normal statutory review procedures. That, we submit, is what is involved here.

This Court and the lower federal courts have held that despite the existence of a prescribed review procedure, a party aggrieved by the unauthorized action of an administrative

agency may challenge such action by a suit in a district court to declare the agency's action illegal and to enjoin enforcement of its order. The rationale for permitting an alternative challenge to illegal agency action premised on general jurisdictional grants, despite the existence of a specifically applicable statutory review procedure, was expressed succinctly by this Court in *Leedom* v. *Kyne*, 358 U.S. 184, 188 (1958):

> This suit is not one to "review," in the sense of that term as used in the Act, a decision of the Board made within its jurisdiction. Rather it is one to strike down an order of the Board made in excess of its delegated powers and contrary to a specific prohibition in the Act.

See also Skinner & Eddy Corp. v. *United States*, 249 U.S. 557, 562 (1919) (plaintiff's right to proceed by way of a district court action, despite the existence of a specifically applicable statutory review procedure, upheld on the ground that plaintiff contended that "the Commission has exceeded its statutory powers; and that, hence, the order is void").

The principles of *Leedom* v. *Kyne* and *Skinner & Eddy* have been followed in numerous lower court decisions. *See, e.g. Elmo* v. *Dixon*, 348 F.2d 342, 343-344 (D.C. Cir. 1965); *Holman* v. *SEC*, 299 F.2d 127, 129-130 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962); *Ashland Oil Co.* v. *FEA*, 389 F. Supp. 1119 (N.D. Cal. 1975); *California ex rel. Christensen* v. *FTC*, 1974-2 Trade Reg. Rep. ¶ 75,328 (N.D. Cal. 1974); and *R.H. Macy* v. *Tinley*, 249 F. Supp. 778, 782 (D.D.C. 1966). Particularly pertinent is *Pan American World Airways* v. *Boyd*, 207 F. Supp. 152, 160 (D.D.C. 1962), *reversed on other grounds sub nom. Alaska Airlines, Inc.* v. *Pan American World Airways*, 321 F.2d 394, 396 (D.C. Cir. 1963), in which, after giving full consideration to the language of § 1006(a), 49 U.S.C. 1486(a), the district court upheld its jurisdiction over a suit challenging a Board order on the ground that it was issued in excess of the Board's jurisdiction. Citing *Skinner & Eddy*, the court held that administrative remedies need not be exhausted

"in cases in which a claim is advanced on substantial grounds that the administrative agency is transcending its legal authority".[8]

In the foregoing cases the vehicle for supplementing specifically applicable statutory review procedures was a suit in a district court for a declaratory judgment and injunctive relief. However, it would be anomolous for a court of appeals to have any less authority to consider a jurisdictional question not previously litigated by the parties, where the issue is raised as an integral part of the review of an agency order properly before the appellate court. Since the basic validity of the Tax Allocation Orders here rests on the Board's statutory authority to assert jurisdiction as it did in the Reorganization Order, resolution of the latter question is a necessary predicate to the complete and fair disposition of the Board's Tax Allocation Orders.

Even if the challenge to the Reorganization Order were regarded as a collateral attack on an earlier judgment void for lack of subject matter jurisdiction, such challenge would be proper. *See* Davis, *Administrative Law Treatise,* § 18.10, at 612 (1958). *Cf., West* v. *Standard Oil Co.*, 278 U.S. 200, 220-221 (1929). The lack of a challenge by petitioners of the 1970 Reorganization Order within 60 days of its entry under § 1006(a), 49 U.S.C. 1486(a), should not have been viewed as a bar to consideration by the Ninth Circuit since petitioners'

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[8] On appeal, the court of appeals held that the district court's action was "premature" because there was "no way of knowing whether the Board would make one of five concededly valid orders out of six possible alternatives. . . ." The court did not disagree with the validity of the *Skinner & Eddy* holding, however, noting:

> Unlike the Court in *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557 . . ., we do not yet know what the Board's final determination will be.

The instant case does not, of course, present the impediment which existed in the *Pan American World Airways* case since the Tax Allocation Orders here constitute final administrative action which, petitioners contend, is *ultra vires* the Board.

allegation was that the Board was without statutory power or jurisdiction to impose conditions on the reorganization plan in the first place. *See Cotherman* v. *FTC*, 417 F.2d 587, 592 (5th Cir. 1969); *cf. United States* v. *Tucker Truck Lines*, 344 U.S. 33, 38 (1952); *Manual Enterprises* v. *Day*, 370 U.S. 478, 499 n.5 (1962).

These principles have been recognized with respect to the same statute involved here by two other circuits in a slightly different context. § 1006(a), 49 U.S.C. 1486(a), excludes from entitlement to review under that section "any order in respect of any foreign air carrier subject to approval of the President. . . ." Notwithstanding this provision, the courts have held that such an order involving a foreign carrier is judicially reviewable "where the action of the Board . . . is beyond the Board's power to act . . . ." *American Airlines, Inc.* v. *CAB*, 348 F.2d 349, 352 (D.C. Cir. 1965); *Pan American World Airways* v. *CAB*, 380 F.2d 770, 775 (2d Cir. 1967), *aff'd by equally divided Court*, 391 U.S. 461 (1968). A similar jurisdictional exception should have been recognized here. The Ninth Circuit's refusal to consider the jurisdictional issue constitutes a significant departure from important, established principles previously recognized by this Court and the lower federal courts.

The policy implications of the Ninth Circuit's refusal to review the question of subject matter jurisdiction are disturbing. In one sense, the refusal can be viewed as fostering administrative blackmail on the part of regulatory agencies. Petitioners in 1970 were put to the impermissible choice of accepting the Reorganization Order and foregoing timely review as prescribed by § 1006(a), 49 U.S.C. 1486(a), or rejecting the Board's unlawfully imposed conditions and litigating while foregoing the economic benefits they were entitled to under the reorganization. It is precisely this type of extralegal, coercive regulatory conduct that will be encouraged if the Ninth Circuit's policy is permitted to continue undisturbed.

It might be suggested that petitioners have an adequate remedy in a federal district court.[9] It is questionable, however, whether it is good policy to promote, as the Ninth Circuit decision does, a multiplicity of litigation and an unnecessary strain on judicial resources by requiring parties situated similarly to petitioners to add actions for declaratory and injunctive relief onto the district court dockets, as well as ensuing appeals to the courts of appeals' dockets. Petitioners had a matter, the Tax Allocation Orders, properly before the court of appeals. With the court of appeals properly seized of jurisdiction with respect to an integrally related issue, it does not make sense to require that the litigation be bifurcated and that the subject matter jurisdiction question be split off and handled first in a district court, only to come back later to the same court of appeals.[10]

It goes without saying that the more readily available a forum for deciding subject matter jurisdiction questions, the more quickly such basic jurisdictional questions will be settled. We submit that permitting a court of appeals to address a subject matter jurisdiction question in the context here presented would promote sound utilization of judicial resources.

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[9] Petitioners' own experience, however, belies the validity of this assertion as a practical matter. Out of an abundance of caution and a deeply held desire to have the matter judicially settled, petitioners more than three years ago sought to challenge the Reorganization Order in the United States District Court for the Central District of California, *Tiger International, Inc.* v. *Civil Aeronautics Board*, Civil Action No. 74-1037 (WMB). Although that action was commenced in April, 1974 and petitioners' motion for summary judgment was argued in September, 1974, Judge Byrne has not rendered any decision.

[10] This case illustrates that the resultant multiplicity of litigation can attain yet larger scope. There already are two additional cases involving petitions for review of Board orders by petitioners before the Ninth Circuit, each of which involves as a basic aspect the Reorganization Order jurisdiction question, *The Flying Tiger Line Inc.* v. *Civil Aeronautics Board*, No. 75-2640, and *Tiger International Inc.* v. *Civil Aeronautics Board*, No. 76-2075. Petitioners have moved to defer briefing these cases pending the disposition of the instant petition.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 75-1774

TIGER INTERNATIONAL, INC. and
THE FLYING TIGER LINE INC.,
Petitioners,

-vs-

CIVIL AERONAUTICS BOARD,
Respondent.

May 18, 1977

Petition to Review a Decision of the Civil Aeronautics Board

Before: GOODWIN and WALLACE, *Circuit Judges,* and FERGUSON,* *District Judge.*

WALLACE, *Circuit Judge*:

This appeal comes to us in the form of a petition to review certain orders of the Civil Aeronautics Board (CAB). 49 U.S.C. § 1486. The petitioners, Tiger International, Inc. (TI)[1] and The Flying Tiger Line Inc. (FTL), argue that the CAB had no jurisdiction to issue Order 70-6-119 and that it acted beyond its authority, in an arbitrary and capricious manner, without a basis in substantial evidence, and in violation of due process in issuing Order 73-12-106 and Order 75-2-1. Because we find that we have no jurisdiction to review Order 70-6-119, we dismiss the petition as to that matter. We affirm both Order 73-12-106 and Order 75-2-1.

[1] Until July 1, 1974, Tiger International, Inc. was called The Flying Tiger Corporation. Throughout this opinion we use the initials "TI" to represent the company under both of its names.

I

In July 1969 The Flying Tiger Line Inc. (Flying Tiger),[2] an air carrier specializing in transporting cargo, requested the CAB to disclaim jurisdiction over certain aspects of a proposed corporate reorganization and to approve the transfer of the carrier's certificates of public convenience and necessity to a new corporation. Under the proposed reorganization, the carrier would create a holding company, TI, and a wholly-owned subsidiary, FTL. FTL would be an operating company and would continue the air cargo business of the predecessor carrier. It was to FTL that Flying Tiger desired to transfer its certificates of public convenience and necessity.

The primary purpose for the reorganization into a holding company format was to facilitate diversification into businesses other than air transport. The air carrier industry traditionally has been cyclical, with alternating periods of prosperity and business downturn. The management of Flying Tiger believed that through diversification it could achieve a more stable profit pattern, make more efficient use of working capital in excess of aviation needs, achieve economies and reap more fully the benefits of certain provisions of the tax laws.

On May 5, 1970, the CAB entered its Order 70-6-119 (1970 Order)[3] in which it refused to disclaim jurisdiction over the reorganization. Rather, it asserted jurisdiction under section 408 of the Federal Aviation Act (the Act), 49 U.S.C. § 1378,[4] and pursuant thereto approved the reorganization sub-

[2] This corporation is different from the corporation with the same name which we refer to as FTL.

[3] The 1970 Order did not become effective until June 19, 1970, when it was approved by President Nixon. Presidential approval was necessary because the air carrier was involved in international traffic. Federal Aviation Act § 801, 49 U.S.C. § 1461.

[4] Because we determine in this opinion that we have no jurisdiction to review the 1970 Order, see section II *infra*, we deem it unnecessary to set out in the text the factual background and the arguments of the opposing parties bearing on the validity of that Order. Basically, the issue concerns the jurisdiction of the CAB to regulate a corporate reorganization of the type involved in this case.

ject to several conditions designed by the agency. One of those conditions (condition 3) required that TI

> or any other company within the existing Flying Tiger Corporation system of affiliates and subsidiaries shall not in any calendar year, and without prior Board approval, either individually or jointly enter into any inter-company transactions with or affecting [the air carrier, FTL] which will have an aggregate value of $100,000 or more.[5]

On June 24, 1970, the Flying Tiger management accepted the conditions of the 1970 Order. Shortly thereafter in Order 70-6-153 (June 30, 1970), the CAB directed Flying Tiger to transfer its certificates of public convenience and necessity to FTL.[6]

Between 1970 and 1971, TI and FTL commenced their diversification program by acquiring all of the common stock of North American Car Corporation (NAC). In 1971, the diversification continued when NAC purchased the common stock of National Equipment Rental Limited (NER).

In July 1973, TI, FTL, NAC and NER entered into a tax allocation agreement. Because the operation and ramifications of this agreement bear significantly on the resolution of several of the issues raised in this appeal, a detailed explanation of its provisions is necessary.

Under the agreement, the holding company, TI, could, if it elected to do so, file a consolidated federal income tax return—that is, one covering all subsidiaries or affiliates of TI. Each subsidiary, however, was to compute its own tax liability

[5] In its Order 74-5-90 (May 17, 1974), the CAB revised the 1970 Order by raising the dollar limit from $100,000 to $1,000,000.

[6] Whereas the CAB based its authority to regulate the corporate reorganization on section 408, 49 U.S.C. § 1378, it ordered the certificates of public convenience and necessity transferred pursuant to its authority under section 401(h), 49 U.S.C. § 1371(h). TI and FTL have not contested the CAB's jurisdiction under section 401 to regulate the transfer of the certificates.

as if it were filing a separate tax return and then to pay to TI the amount of that liability. If the subsidiary had no liability but rather would be entitled to a refund if it filed a separate return, TI was to pay that amount to the subsidiary. Also, TI was to give to each subsidiary except FTL a credit for the amount of any net operating losses or tax credits generated by that subsidiary and applied in computing the consolidated tax return.[7] To FTL, however, TI was to give not credits but an immediate cash payment equaling the tax savings achieved from the use of FTL's tax credits and operating losses. Although entered into in 1973, the tax allocation agreement provided that it was to have effect in the 1971 and 1972 tax years, as well as prospectively.

The operation of the tax allocation agreement can be clarified by presenting an example. In 1973, FTL's independent tax liability would have been approximately $10,960,000. The Tiger group's consolidated tax obligation, however, was less than one-third that amount, primarily because of the net operating losses of NAC. In a conscious attempt to offset FTL's pre-tax book profits, NAC had both greatly increased its capital purchases—by buying in 1973, for example, 5,500 new railroad cars at a cost of $110,000,000—and adopted an accelerated method of depreciation. Thus the tax allocation agreement would have required FTL to pay the $10,960,000 to TI, which in turn would have used a fraction of that amount to pay the consolidated tax and the balance to meet the capital needs of the member subsidiaries and to continue the diversification program.

Because the tax allocation agreement constituted an inter-company transaction within the scope of condition 3 of the 1970 Order, TI and FTL applied to the CAB to secure its approval of

[7] Although there is some uncertainty from the agreement *when* each subsidiary could redeem its credits, it appears that the credits were to be redeemed by offsetting them against the separate return tax liability of the subsidiary—which under the agreement is payable to TI—in those subsequent years when such a liability exists.

the transaction. They did not, however, request a hearing on the matter, and the CAB did not order one. The CAB thereafter refused to approve the agreement as submitted, substituting instead its own plan. Order 73-12-106 (December 26, 1973) (1973 Order). Under the CAB approach, FTL cannot transfer to TI its tax-sheltered profits in the form of "independent tax liability" and FTL is permitted to pay to TI only its proportionate share of the consolidated tax liability. The CAB further directed FTL to issue its own credits to other members of the TI group whose losses and tax credits are used to shelter FTL income.

The 1973 Order was, by its own terms, "a temporary measure, to be superceded by" a final CAB order in the then pending Air Carrier Reorganization Investigation (ACRI). 1973 Order, at 3 n.4. With its 1970 reorganization, FTL had become the second air carrier to adopt a holding company format for diversification purposes. United Air Lines was the first,[8] and Braniff Airways attempted to become the third with an application to the CAB some time before March 1972. In response to this new phenomenon in the air carrier industry, the CAB instituted ACRI in March 1972. The purpose of the investigation was to determine "whether air carriers should be permitted to diversify their business activities through the creation of holding companies, and, if so, what policies, rules and/or regulations, if any, should the [CAB] adopt in order to regulate this form of diversification . . . ." Order 75-10-65, at 1 (October 17, 1975). ACRI resulted in final orders, Orders 75-10-65 et seq. (ACRI Orders), which contain a comprehensive regulation of the holding company format, including regulation of tax allocation agreements. The ACRI Orders' effective date

[8] When United Air Lines created its holding company in April 1970, the CAB disclaimed jurisdiction under section 408 of the Act, 49 U.S.C. § 1378. *See* Order 69-4-67 (February 17, 1969). The CAB refused to disclaim jurisdiction of the later Flying Tiger diversification because it construed an intervening amendment to section 408, Act of August 29, 1969, Pub. L. No. 91-62, 83 Stat. 103, *amending* 49 U.S.C. § 1378, as giving it jurisdiction over such transactions.

is May 14, 1976, at which time the measure here under attack, the 1973 Order, ceased to be operative.[9]

After the CAB in its 1973 Order significantly modified the tax allocation agreement, TI and FTL petitioned for reconsideration. Again they did not request a hearing. On February 3, 1975, the CAB denied that petition in its Order 75-2-1 (1975 Order). TI and FTL then petitioned this court for a review of the 1973 and 1975 Orders and, indirectly, for a review of the 1970 Order.

II

The only basis for our jurisdiction over this controversy is section 1006(a) of the Act, 49 U.S.C. § 1486(a), which provides in part:

> Any order, affirmative or negative, issued by the Board or Administrator under this chapter . . . shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

[9] The ACRI Orders obviously did not moot the present appeal, however, because the 1973 Order was effective for approximately two and one-half years, a period not affected by the ACRI Orders, which are only prospective in effect. Our opinion on the validity of the 1973 Order will resolve a live controversy: May TI and FTL apply their tax allocation agreement as submitted to the period to May 1976? Our affirmative response would permit the transfer of large amounts of funds from FTL to TI.

Also, review of the ACRI Orders has been sought in the District of Columbia Circuit. In light of the similarity between some aspects of the ACRI Orders and the 1973 Order under review here, and given the pending review of the former in the District of Columbia Circuit, we requested the parties to submit supplemental memoranda discussing whether we should defer our decision until after the District of Columbia Circuit handed down an opinion on the ACRI Orders. The CAB argued for deferral; TI and FTL were opposed to such a course.

After reviewing the supplemental memoranda, we ordered this appeal submitted. In our view, a stay of submission was inappropriate because of the likelihood that disposition of the ACRI appeal would turn on issues of fact and law distinct from those raised here.

The CAB concedes that the petition of TI and FTL to review the 1973 Order, as reaffirmed in the 1975 Order, is timely under section 1006(a).[10] It contends, however, that we lack jurisdiction to review the 1970 Order because TI and FTL failed to petition for review within 60 days of its entry.[11]

TI and FTL attempt to circumvent this jurisdictional defect with three theories. First, they argue that the 1970 Order is a "necessary predicate" to the later two orders and that it therefore must be considered first. In short, TI and FTL are presenting the three orders as so intertwined as not to permit separate review.

While granting that there is a direct connection between the 1970 Order, particularly condition 3, and the 1973 and 1975 Orders, we find the argument of TI and FTL unpersuasive. As a practical matter, we can refuse to review the 1970 Order and still adequately address the challenges to the 1973 and 1975 Orders on the merits. Indeed, the brief of TI and FTL proposes such a disposition in the event we do not invalidate the 1970 Order. Further, our statutory grant of jurisdiction, section 1006(a) of the Act, speaks in terms of individual orders: "Any *order* . . . shall be subject to review . . . upon petition, filed

[10] When a motion for rehearing or reconsideration of an order is made in a proceeding before the CAB, time for filing the petition to review that order does not begin to run until the CAB acts on the motion. *Outland* v. *CAB*, 284 F.2d 224, 226-28 (D.C. Cir. 1960).

[11] Time limitations for certiorari, appeal and review set out in *statutes* are uniformly regarded as jurisdictional. *See generally* *Schacht* v. *United States*, 398 U.S. 58 (1970); H. Hart & H. Wechsler, The Federal Courts and the Federal System 1593 (2d ed. P. Bator, *et al.* 1973).

within sixty days. . . ." (Emphasis added.) In our view, this language does not permit "intertwining" of orders for review purposes, that is, using a timely petition to review an order as a means of bringing before us a related order for which the appeal period has run.

Second, TI and FTL seek the benefit of the last sentence of section 1006(a) which empowers the courts to permit late filing of a petition for review "upon a showing of reasonable grounds for failure to file the petition theretofore." They argue that the right to file a timely petition with the Court of Appeals "was more apparent than real," because under the terms of the Order they were required either to abandon the reorganization or to carry it forward subject to the CAB's burdensome conditions. Thus, in effect, they argue that they had no practical alternative to accepting the 1970 Order.

We reject this argument. The decision to appeal or not is often difficult, especially in cases such as this where the judgment of the agency grants part or most of the benefits sought but the applicant cannot accept those benefits and at the same time appeal the judgment.[12] Nevertheless, TI and FTL made their decision. They accepted the reorganization subject to the CAB's conditions and forewent an appeal. The circumstances surrounding that conscious decision do not, in our view, constitute the "reasonable grounds" for delay contemplated by section 1006(a).

Finally, TI and FTL argue that where an agency has acted beyond the scope of its jurisdiction or authority, an aggrieved

[12] The 1970 Order made "full acceptance of the conditions" of that Order a prerequisite to obtaining CAB approval of the transfer of Flying Tiger's certificates to FTL. 1970 Order, at 10 (condition 8). Obviously, FTL could not engage in the air cargo business without the certificates. TI and FTL were therefore faced with an all or nothing situation: either they could refuse to accept the 1970 Order, halt the reorganization and petition for review or they could accept the Order and proceed with the reorganization subject to the CAB's conditions. But they could not, as a practical matter, both reorganize and petition for review.

party is not limited to the normal statutory review procedures. In support of their contention, they cite *Leedom* v. *Kyne*, 358 U.S. 184 (1958), and various lower court opinions following that decision. *Leedom* stands for the general proposition that the review provisions in some of the various acts governing administrative agencies do not limit the original jurisdiction of the district courts under general jurisdiction grant statutes. Thus when an administrative decision is void because made, for example, without subject-matter jurisdiction or in excess of statutory authority, that decision may, in effect, be collaterally attacked.

In advancing this argument, TI and FTL fail to perceive the significance of one crucial distinction. The collateral attack in all the cases upon which they rely was made in a separate proceeding in the district court and in each case the court had an *independent* basis for exercising jurisdiction, such as the presence of a federal question, 28 U.S.C. § 1331, or the presence of an issue arising under a federal statute regulating commerce, 28 U.S.C. § 1337. In each case, the court looked to the pertinent agency action review provision, generally one framed like section 1006(a), to determine whether Congress intended by that statute to limit the court's independent source of jurisdiction. There was never any discussion whether the uncomplied-with review provision *conferred* jurisdiction on the district court.

In our case, either section 1006(a) confers jurisdiction on this court or we have no jurisdiction to review directly the CAB's orders. Other than section 1006(a), there is no statute which grants us subject-matter jurisdiction over the issues raised in this case. Because the bounds of our jurisdiction are set by Congress, *Sheldon* v. *Sill*, 49 U.S. (8 How.) 440 (1850); *Malamud* v. *Sinclair Oil Corp.*, 521 F.2d 1142, 1146-47 (6th Cir. 1975); *Edwards* v. *Selective Service Local Board No. 111*, 432 F.2d 287, 290 (5th Cir. 1970), *cert. denied*, 402 U.S. 952 (1971), when TI and FTL ask us to disregard the only available congressional grant of jurisdiction and to review the

1970 Order *in spite of* section 1006(a), they in effect concede our lack of power to make that review.[13]

Therefore, on the ground that we have no jurisdiction, we dismiss the petition of TI and FTL insofar as it seeks review of the 1970 Order.

III

In resolving the challenges to the 1973 and 1975 Orders, our initial task is to determine what standard, if any, the CAB must meet before it may properly withhold its approval of or modify an intercompany transaction presented to it for approval pursuant to an order like the 1970 Order, condition 3. Our second task is to identify what standard of judicial review governs our evaluation of the CAB's decision. Finally, we must determine from the record before us whether that decision is sustainable on appeal.

A

The CAB does not contend that it has plenary power over intercompany transactions within the scope of condition 3 of the 1970 Order or that it may approve, reject or modify such transactions at will. Rather, the CAB argues that it should be bound to a "just and reasonable" standard: that is, if the proposed intercompany transaction is just and reasonable the CAB is required to approve it; if not, the CAB may withhold approval or modify the transactions to make it just. It is argued that the basis for this standard is section 408(b) of the Act, 49 U.S.C. § 1378(b), which provides that the CAB, when approving by order the consolidation, merger or purchase of an air carrier, may include in the order "such terms and conditions as it shall find to be *just and reasonable* and with such modifications as it may prescribe . . . ." (Emphasis added.) It was pursuant to this statutory provision that the CAB imposed condition 3 of the 1970 Order, and, of course, it was pursuant to condition 3 that TI and FTL submitted the tax allocation agreement to the CAB for its approval.

It should be noted at this point, however, that the term *just and reasonable* in section 408(b) refers to and is a limiting modifier of the "conditions" that the CAB may affix to its orders. The term, read in context, does not refer to agency action taken pursuant to those conditions, nor does it refer to air carrier activities. Nevertheless, in overseeing intercompany transactions the CAB has traditionally referred to the transactions either as "just and reasonable and in the public interest" or as not "just and reasonable" as a way of stating its conclusion.[14]

As a practical matter of administrative adjudication and appellate review, the language of the "just and reasonable" standard is so vague and inherently subjective that it fails to offer meaningful guidance. Indeed, without elaboration or refinement, the standard as stated carries the risk of converting the CAB's limited authority into a plenary power and of shielding inconsistent, capricious or arbitrary administrative action. The CAB, however, appears to have poured meaning into the "just and reasonable" standard, at least in the present

[13] *See generally* Note, *Jurisdiction to Review Federal Administrative Action: District Court or Court of Appeals,* 88 Harv. L. Rev. 980 (1975).

Perhaps concerned that a collateral attack on an agency order could be successful only in district court, TI and FTL brought a separate action in federal district court in the Central District of California challenging the CAB's jurisdiction to issue the 1970 Order. Civil Action No. 74-1037-WMB. They are seeking there a declaratory judgment and injunctive relief.

It goes without saying that the discussion in this opinion concerning our jurisdiction to review the 1970 Order applies only to this court. We intimate no views on the jurisdiction of the district court over the matter.

[14] For example, for many years the CAB reviewed intercompany transactions involving the Hughes Tool Company and Trans World Airlines. When it approved those proposed transactions, the CAB would declare them to be "just and reasonable and in the public interest." *See Hughes Tool Co.* v. *Trans World Airlines, Inc., 409 U.S. 363, 375-76 (1973).*

case, by referring to the purposes underlying condition 3. In the 1970 Order, the CAB stated that the purpose was "to protect the public against any impairment of the air carrier's certificate obligations which might arise by reason of the relationships or transactions among [TI] and its subsidiaries and affiliates . . . ." 1970 Order, at 7.[15] Thus by reference to the purpose of condition 3, the CAB's task when reviewing an intercompany transaction becomes one of determining whether that transaction impairs or is reasonably likely to impair the air carrier's ability to fulfill its certificate obligations.[16] The task is not to determine whether the agreement is just and reasonable in the abstract. Accordingly, if the CAB finds a reasonable likelihood of impairment of the air carrier's ability to perform its certificate obligations, it may reject or modify the proposed transaction; otherwise, it must grant its approval.

We accept this refinement of the "just and reasonable" standard. A standard of administrative review that focuses on the impairment of an air carrier's ability to fulfill its certificate obligations is both more meaningful and more susceptible to intelligent and consistent application than the inherently vague language of the "just and reasonable" standard. Further, the "impairment" standard is so cast that it requires the CAB to articulate the carrier's certificate obligations, to analyze carefully the proposed intercompany transaction, and to identify from the evidence the pernicious or disruptive consequences to the carrier, if any, reasonably likely to flow from the proposed agreement. The very objectivity of this process minimizes the risk of arbitrary action inherent in a standard that permits an agency to measure fairness and reasonableness in the abstract.

[15] Recently, when called upon to restate the purpose of condition 3, the CAB reiterated this language concerning impairment of the air carrier's certificate obligations. Order 75-5-125, at 4 n.11 (May 3, 1975).

[16] The CAB equates an "impairment of certificate obligations" standard with its "just and reasonable" standard in this manner:

> When the Tigers returned to the Board in 1973 [seeking approval of the tax allocation proposal], the Board was called upon once more to make the same type of determination [made in the 1970 Order] regarding the potential "impairment of the air carrier's certificate obligations." For this reason, the Tigers' tax agreement was examined to determine whether it was "just and reasonable," and whether it comported with the public interest criteria of Section 102 [of the Act].

Brief of Respondent, at 27.

In addition to the foregoing, there is another reason why the CAB should be permitted to reject or modify intercompany transactions only in accordance with the "impairment" standard: application of a less rigorous standard would subvert congressionally-imposed limitations on CAB authority. Congress has determined that the CAB can include a condition such as condition 3 in its orders only if the agency finds that condition to be "just and reasonable." Section 408(b), 49 U.S.C. § 1378(b). The basis for the CAB's determination that condition 3 is "just and reasonable" is the ongoing need to ensure that no impairment of FTL's ability to perform its certificate obligations results from coercive or manipulative intercompany transactions. It follows that the CAB, when reviewing a transaction pursuant to condition 3, should not disregard that condition's purpose and reject or modify the proposed transaction solely because, for example, a transaction even more favorable to the carrier is conceivable. To permit such administrative action when there is no reasonable likelihood that the proposed transaction would impair performance of certificate obligations would be tantamount to reading the "just and reasonable" language out of section 408. Accordingly, to preserve the statutory scheme, the purpose of a section 408 condition must be used to define the limits of CAB authority under that condition. In the present case, this analysis reinforces our view that the CAB may reject or modify a proposed transaction pursuant to condition 3 only if that transaction is reasonably likely to impair FTL's ability to perform its certificate obligations.

TI and FTL agree that the CAB may reject or modify a proposed intercompany transaction when necessary to prevent

impairment of FTL's certificate obligations. They go a step further, however, and argue that the "impairment" standard limits the CAB to determining whether the transaction treats FTL less fairly than it would be treated as an independent carrier, or places it in a less favorable financial position than it would have enjoyed outside the holding company structure. We reject this contention for two reasons. First, it is conceivable that TI and its subsidiaries, including FTL, could enter into an agreement that would accord FTL the same benefits it would enjoy as an independent company yet which would tend to impair its ability to fulfill its certificate obligations. If and when such a transaction is proposed, the CAB should be free to reject or modify it. Second, the limitation proposed by TI and FTL necessarily requires the CAB to address and answer a hypothetical question: What would FTL's position be had it remained independent? There is simply no way that the CAB and the parties can bring that inquiry down from the realm of speculation—especially as FTL becomes further removed from its independent status. Although "but for" speculation is necessary in some aspects of the law, there is no reason to require the CAB to engage in it in this context.

B

Determining what standard of judicial review governs our evaluation of the CAB's decision is a more difficult task. TI and FTL argue that we must apply a "substantial evidence" standard. In this case, that standard would require us to set aside the 1973 and 1975 Orders if the record, viewed as a whole, did not contain substantial evidence to support a finding that the tax allocation agreement impairs or is reasonably likely to impair FTL's ability to fulfill its certificate obligations.

Both legislation and case law from outside this circuit provide some support for the substantial evidence standard. Section 1006(e) of the Act, 49 U.S.C. § 1486(e), provides in part: "The findings of facts by the Board or Administrator, *if supported by substantial evidence*, shall be conclusive." (Emphasis added.) The view that this provision admits of no exceptions to the substantial evidence standard is reinforced by section 1005(f) of the Act, 49 U.S.C. § 1485(f), which provides in part: "*Every* order of the Administrator or the Board shall set forth the *findings of fact* upon which it is based . . . ." (Emphasis added.)[17]

Also, some courts have construed the substantial evidence standard of section 1006(e) broadly. For example, in *Pillai* v. *CAB*, 485 F.2d 1018 (D.C. Cir. 1973), the District of Columbia Circuit reviewed orders of the CAB extending into the 1973 travel season the International Air Transport Association's 1972 rate agreements covering North Atlantic routes. As in this case, the record from which the orders emanated was sparse and, although this fact is obscure in the opinion, no hearing was held during the course of the proceedings leading to the orders. The record consisted only of the CAB's orders, written justifications submitted by three American air carriers, written comments by an association of supplemental carriers, minutes of a currency conference, and the complaint of a consumer group. Nevertheless, the court applied the substantial evidence standard and ultimately set the orders aside. Citing section 1006(e), the court said:

> To the extent that the Board's "public interest" determination *involved factual predicates*, the substan-

[17] The persuasiveness of the view that Congress intended with sections 1005(f) and 1006(e) to provide the exclusive standard of judicial review is substantially diminished by the timing of all relevant congressional action. Sections 1005(f) and 1006(e) date back to the original Civil Aeronautics Act of 1938, Pub. L. No. 706, §§ 1005(f), 1006(e), 52 Stat. 1025. At that time, a hearing was required in *all* cases arising under what is now section 408 of the Act. *See* Civil Aeronautics Act of 1938, Pub. L. No. 706, § 408(b), 52 Stat. 1001. Congress did not provide an exception to the hearings requirement of section 408 until 1960. Act of Sept. 13, 1960, Pub. L. No. 86-758, § 1, 74 Stat. 901, *amending* 49 U.S.C. § 1378(b). The present case arises from administrative proceedings that did not include a hearing, pursuant to the 1960 amendment. *See* note 18 *infra*.

tive statute requires that they be supported by substantial evidence.

Id. at 1023 (emphasis added); *see also Railway Express Agency, Inc.* v. *CAB,* 345 F.2d 445 (D.C. Cir. 1965).

Notwithstanding this support for such a standard, our evaluation of the procedural history of this case, relevant Supreme Court and Ninth Circuit decisions, and various policy considerations lead us to conclude that the substantial evidence standard should not be applied here. Rather, we will review the CAB's 1973 and 1975 Orders only to determine whether they are arbitrary and capricious.

In *Camp* v. *Pitts,* 411 U.S. 138 (1973), the Supreme Court distinguished between the standard of review which is appropriate where a hearing is held from one where no hearing is held. There, bankers applied to the Comptroller of the Currency for a certificate authorizing them to organize a new bank. They did not request a hearing and the governing statutes did not require one. Agency regulations permitted a hearing at the discretion of the Comptroller only upon request. The Comptroller denied the application. The bankers petitioned for reconsideration but again failed to request a hearing. Again the Comptroller denied their application. A federal district court, on the basis of the administrative record, upheld the Comptroller's decision because "there is substantial basis for his determination, and ... it was neither capricious nor arbitrary." The court of appeals reversed and remanded, holding that the district court should have held a trial de novo. The Supreme Court disagreed. It first noted that the Comptroller was not required to hold a hearing or to make formal findings on a hearing record when passing on the application for a new bank. The Court then stated: "Accordingly, the proper standard for judicial review of the Comptroller's adjudications is *not* the 'substantial evidence' test which *is* appropriate when reviewing findings made on a hearing record ...." *Id.* at 141 (emphasis added; citation omitted). While review was

pursuant to the Administrative Procedure Act (APA) and not, as here, section 1006 of the Act, 49 U.S.C. § 1489, we find it significant that the Court recognized a critical difference between review of a hearing record and review in a case where no hearing is held.

Also, we have already refused to apply the substantial evidence standard to a case brought pursuant to section 1006 of the Act where no administrative hearing had been held. In *Island Airlines, Inc.* v. *CAB,* 363 F.2d 120 (9th Cir. 1966), an airline petitioned the CAB for an exemption from economic regulation. Various political bodies submitted resolutions supporting the petition, and two competing airlines filed answers in opposition. The petitioning airline neither filed a response to this opposition nor requested a hearing, even though a hearing was available, upon request, at the discretion of the Board. The CAB denied the petition. On review, we noted the "surprising ... fact that Island did not request a hearing by the CAB on its exemption application, as it [was] authorized to do," *id.* at 124, and proceeded to uphold the CAB's decision under an "arbitrary, capricious or abuse of discretion" standard, *id.* at 125-26.

These cases lend support to the proposition that on the facts of this case, an arbitrary and capricious standard is appropriate. First, no administrative hearing was held on the application of TI and FTL for approval of the tax allocation agreement. Second, TI and FTL did not request a hearing, either initially or in their petition for rehearing; instead they were satisfied to let the CAB decide the issue on the basis of *their own* (TI's and FTL's) documentation. Third, the CAB was neither statutorily nor constitutionally required to hold a

hearing.[18] Finally, no opponent of the proposed tax allocation agreement appeared in the proceedings to present countervailing arguments and evidence.[19]

Sound considerations of policy also support this result. If we were to apply a substantial evidence standard to a case where no hearing was required or requested and where the bulk of the record consists of the petitioner's own documentation in support of its application, the CAB would be placed in an extremely difficult position. It would in all such cases find it necessary to order a hearing sua sponte or otherwise introduce

[18] TI and FTL do not contend that the CAB was statutorily required to hold a hearing on their application for approval of the tax allocation agreement or on their petition for reconsideration. Indeed, the record here precludes such an argument. In 1960, Congress amended section 408 of the Act, 49 U.S.C. § 1378, to permit the CAB, in certain circumstances and pursuant to certain procedures, to dispense with a hearing in cases arising under that section. Act of Sept. 13, 1960, Pub. L. No. 86-758, § 1, 74 Stat. 901, *amending* 49 U.S.C. § 1378(b). In the proceedings leading to the 1970 Order, the CAB, after fully complying with that amendment, dispensed with a hearing. In that Order, the CAB retained jurisdiction to impose, without a hearing, further conditions. Flying Tiger accepted this provision, along with all others in the Order. Under authority of this provision, the CAB then conducted, without a hearing, the proceedings leading to the 1973 and 1975 Orders.

TI and FTL do argue, however, that the CAB was constitutionally required to afford them a hearing before entering the 1973 and 1975 Orders. But because they did not make that argument to the CAB, they cannot raise it on appeal. 49 U.S.C. § 1486(e) (second sentence); *Island Airlines, Inc.* v. *CAB,* 363 F.2d 120, 124 (9th Cir. 1966). We presume, therefore, that the CAB acted within constitutional bounds.

[19] Other circuits have applied the substantial evidence standard to cases where no hearing was held but where opponents of the petitioning air carrier's application appeared before the CAB to present countervailing arguments and evidence. *Law Motor Freight, Inc.* v. *CAB,* 364 F.2d 139 (1st Cir. 1966), *cert. denied,* 387 U.S. 905 (1967); *Nebraska Dept. of Aeronautics* v. *CAB,* 298 F.2d 286 (8th Cir. 1962). Although these cases may conflict with our decision in *Island Airlines, Inc.* v. *CAB, supra,* 363 F.2d 120, we see no inconsistency between them and our treatment of the factually distinguishable case presently before us.

into the administrative record a quantum of evidence contrary to the applicant's position sufficient to preserve the option of ruling against the applicant and of having that ruling sustained on appeal. We do not believe that Congress intended such a strange result when it eliminated the hearing requirement for some cases, including the one before us, arising under section 408 of the Act.[20]

Accordingly, we hold that we may set aside the 1973 and 1975 Orders only if the decision embodied in them regarding potential impairment of FTL's certificate obligations is arbitrary or capricious.

C

In light of the wide deference required by the "arbitrary and capricious" standard of judicial review, we must affirm the 1973 and 1975 Orders. Those Orders reflect rational decision making and, in particular, a not unreasonable evaluation of the tax allocation agreement's potentially adverse impact on FTL's performance of its certificate obligations. Pursuant to the agreement, FTL would pay to TI the amount of money which would have constituted its tax liability if it were an independent company. The CAB could rationally conclude, that with this agreement in effect, TI management might be able to siphon funds away from FTL in profitable years and, in the process of doing so, withdraw from that subsidiary necessary working capital. Clearly, a continuing program of capital expenditures by FTL is essential if it is to meet its ongoing certificate obligations to the public. Accordingly, the CAB's modification

[20] The primary purpose of the 1960 amendment permitting the CAB to dispense with a hearing in some cases, *see* notes 17 & 18 *supra,* was to facilitate CAB disposition of section 408 cases, not to hinder that process. *See* H.R. Rep. No. 2171, 86th Cong., 2d Sess. (1960), *reprinted at* 1960 U.S.C. Cong. & Ad. News 3557-60; *Hearings on H.R. 7105, H.R. 7111 and S. 1545 Before a Subcomm. of the House Comm. on Interstate & Foreign Commerce,* 86th Cong., 2d Sess. (1960).

of the agreement may be viewed as an attempt to insure that a proportionate share of the TI group's tax savings be available for future FTL capitalization programs.[21]

Also, the 1973 and 1975 Orders merely give continuing effect to a CAB decision contained in the 1970 Order: FTL may transfer funds to TI *only* in the form of a cash dividend, which in no event can exceed 50% of FTL's net income. (The proposed tax allocation agreement, of course, would have provided a significant alternative means of transferring funds from the subsidiary to the holding company.) The fact that limited payment of dividends is permitted by the CAB tends to reduce, in our view, the chances of successfully demonstrating arbitrariness in the CAB's rejection of the tax allocation agreement as submitted. Also, while FTL is permitted to transfer funds to TI only through payment of cash dividends, this is rationally related to the CAB's valid objective of monitoring closely intercompany transactions within the Tiger group involving FTL.

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[21] In fairness to FTL and TI management, it must be pointed out that the sparse record before us shows that, if anything, the management of TI has favored FTL over the other subsidiaries. For example, the tax allocation agreement provides that FTL is to receive cash from TI equal to the tax savings on the consolidated return attributable to use of FTL's tax credits and operating losses. The other subsidiaries, however, receive credits from TI which they can redeem only if and when they subsequently have a profitable year. Also, the record reveals that in directing the affairs of the subsidiaries in order to maximize tax savings for the entire group, management assigned NAC and not FTL the course of highest risk. For the benefit of the entire group, NAC engaged in a massive capital expenditures program and then adopted an accelerated method of depreciation, one resulting in a tax shelter much larger than necessary to accommodate NAC's own profits. With the adoption of that method and rejection of a straight-line method of depreciation, TI and NAC increased the risk of a future NAC tax liability. Also, there is no evidence that TI management has or intends to siphon funds away from FTL while at the same time withholding from that subsidiary necessary working capital. As noted earlier in this opinion, TI currently contemplates using tax savings to meet the capital needs of all its member subsidiaries and to continue the diversification program.

In measuring the bare rationality of the CAB's decision regarding the tax allocation agreement, however, we believe it appropriate to consider that decision in light of *potential* problems within the scope of the CAB's regulatory authority.

The CAB's decision regarding the tax allocation agreement perhaps may be subjected to valid criticism. It may well be that the decision is less wise than other alternatives open to the Board. But that is not the question before us. In light of the considerations discussed, we cannot characterize the 1973 and 1975 Orders as arbitrary and capricious. They reflect a not irrational approach to the problem of potential deleterious manipulation of a subsidiary air carrier by its holding company. Because those Orders are reasonably calculated to achieve valid objectives within the scope of the CAB's regulatory authority, we will not set them aside.

AFFIRMED.

No. 77-256

In the Supreme Court of the United States

OCTOBER TERM, 1977

TIGER INTERNATIONAL, INC. and THE FLYING TIGER LINE INC., PETITIONERS

v.

CIVIL AERONAUTICS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 554 F.2d 926. Civil Aeronautics Board Order 70-6-119 is reported at 54 CAB 700. Board Orders 73-12-106 and 75-2-1 (App. A and B, *infra*, pp. 1a-22a) are not yet officially reported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1977. The petition for a writ of certiorari was filed on August 15, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held untimely, under the 60-day limitation period for seeking direct review of orders of the Civil Aeronautics Board (49 U.S.C. 1486(a)), petitioners' 1975 challenge to a 1970 Board order.

2. Whether the court of appeals correctly applied the "arbitrary or capricious" standard of review, instead of the "substantial evidence" standard, to orders of the Civil Aeronautics Board, made in proceedings where no evidentiary hearings were required or held, imposing conditions on a tax allocation agreement between a holding company and its air-carrier subsidiary to prevent impairment of the carrier's financial welfare and ability to perform its certificate obligations.

STATUTE INVOLVED

The relevant provisions of the Federal Aviation Act of 1958, 72 Stat. 731, as amended, 49 U.S.C. 1301 *et seq.*, are set forth at Pet. 2-4.

STATEMENT

In July 1969, petitioners' predecessor, The Flying Tiger Line Inc. ("Flying Tiger"), a certificated all-cargo air carrier, requested the Civil Aeronautics Board to disclaim jurisdiction over a proposed reorganization under Section 408(a) of the Federal Aviation Act, 49 U.S.C. 1378(a), and to approve the transfer of the carrier's certificates of public convenience and necessity to the new operating company

to be formed under the reorganization plan.[1] Flying Tiger proposed to form a holding company, now Tiger International ("TI"), which would assume control of a new corporation, The Flying Tiger Line ("FTL"), which would continue the air carrier operation under the transferred certificates of the original carrier. The primary purpose of the reorganization was to facilitate diversification into businesses other than air transportation (Pet. App. 2a).

The Board declined to disclaim jurisdiction over the reorganization, inasmuch as a 1969 amendment to Section 408(a)(5) of the Federal Aviation Act (83 Stat. 103) made it unlawful for "any person" to acquire control of a certificated air carrier without Board approval.[2] Order 69-12-121 (December 29, 1969), 53 CAB 776. On May 5, 1970, by Order 70-6-119 (the "1970 Order"), the Board approved the reorganization subject to certain conditions (54 CAB 700). One condition required Board approval of intercompany transactions affecting FTL, the air carrier, which exceeded $100,000 in value.[3] The Board imposed this condition "in order to protect the public

[1] Section 401(h) of the Act, 49 U.S.C. 1371(h), requires Board approval before any certificate may be transferred.

[2] Prior to the amendment, Board approval of acquisition of control of a carrier was required only if the acquiring person was an air carrier or other common carrier or was engaged in a phase of aeronautics. The amendment required Board approval for an acquisition of control by "any other person" as well. See 49 U.S.C. 1378(a)(5).

[3] The Board subsequently raised the limit to $1,000,000 (Pet. App. 3a, n. 5).

against any impairment of the air carrier's certificate obligations which might arise by reason of the relationships or transactions among [TI] and its subsidiaries and affiliates * * *." 54 CAB at 703.

On June 24, 1970, Flying Tiger notified the Board that it accepted the terms and conditions of the 1970 Order (R. 100). Accordingly, the Board thereupon approved the transfer of the certificates from the original carrier to the new corporation, FTL. Order 70-6-153 (June 29, 1970), 54 CAB 699. TI then commenced its diversification program (Pet. App. 3a).

In 1973, pursuant to the condition concerning intercompany transactions, petitioners TI and FTL requested Board approval of a tax allocation agreement. Under the agreement, TI, the holding company, would file a consolidated tax return for all its subsidiaries. The subsidiaries would pay TI any tax that would have been due had the subsidiary filed a separate tax return, and each subsidiary would receive from TI the same refund it would have received had it filed a separate return. When a subsidiary's net operating loss, investment tax credits, or other tax credits reduced the group's consolidated tax liability, TI would credit the subsidiary for such tax savings. However, if the carrier subsidiary, FTL, provided such tax savings, its credit would be paid in cash. Petitioners sought approval of the agreement for the past tax years 1971 and 1972 as well as for the future. They did not request a hearing (Pet. App. 3a-5a).

The Board, by its "1973 Order," approved the agreement but added two requirements: (1) that the carrier could pay to the holding company only its proportionate share of the group's actual tax liability, and (2) that the carrier would issue its own credits to the other members of the group whose losses and tax credits sheltered the carrier's income from tax liability (Pet. App. 5a). Order 73-12-106 (December 27, 1973) (App. A, *infra*, pp. 1a-10a). Without these conditions, the agreement would have required FTL to pay TI $7.6 million for the 1971 and 1972 tax years, even though TI paid no consolidated tax in 1971 and only $1.2 million in 1972 (App. A, *infra*, p. 2a, n. 3). Thus, the Board explained, the holding company would have the use of such cash payments generated by the carrier "until the generation of operating profits by the other subsidiaries requires expenditure of the funds in payment of tax liabilities attributable to those subsidiaries" (*id.* at 4a). The Board's conditions were designed to "provide that the air carrier—rather than the holding company —benefit from the use of the air carrier's sheltered income pending any required expenditure of such funds on behalf of the other affiliates" (*ibid.*).

TI and FTL petitioned for reconsideration, again not requesting a hearing. They contended that the Board's order was inconsistent with the Board's prior decisions and that it would prevent them from effectively and efficiently operating as a holding company group (R. 182). By its "1975 Order," the Board denied reconsideration. Order 75-2-1 (February 3, 1975) (App. B, *infra*, pp. 11a-22a).

The Board's 1973 Order modifying petitioners' tax allocation agreement was, by its own terms, "a tempo-

rary measure," adopted pending completion of a thorough investigation of the benefits and risks inherent in air carrier reorganizations such as petitioners'. Pet. App. 5a; Order 73-12-106 (App. A, *infra*, p. 5a, n. 4). In that investigation, the *Air Carrier Reorganization Investigation* ("*ACRI*"), the Board ultimately concluded, after hearings, that the public interest requires that transactions between air carriers and their holding companies be subjected to a regulatory plan. Orders 75-10-65/66 (October 17, 1975) and 75-1-121 (January 30, 1976); see Pet. App. 5a-6a.[4] That plan deals specifically with tax allocation agreements and includes, with respect to such agreements, the same requirements that were attached by the Board to petitioners' tax allocation agreement in the 1973 and 1975 Orders. *Ibid.*

In 1975 FTL and TI petitioned for review in the court of appeals, challenging both the Board's modification of their tax allocation agreement in the 1973 and 1975 Orders and the Board's exercise of jurisdiction in the 1970 Order over their original reorganization. The court of appeals dismissed the challenge to the 1970 Order on the ground that petitioners had failed to challenge that order within the 60-day time limit set forth in Section 1006(a) of the Federal Aviation Act, 49 U.S.C. 1486(a) (Pet. App. 6a-10a). Then, holding that the timely challenge to the 1973

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[4] Petitioners and other carriers have sought judicial review of the *ACRI* orders. *United Air Lines, et al.* v. *Civil Aeronautics Board*, C.A.D.C., Nos. 75-2165 *et al.* (argued February 18, 1977).

and 1975 Orders should be considered under the "arbitrary or capricious" standard of judicial review, not the "substantial evidence" standard (Pet. App. 14a-19a), the court upheld those orders. It found that they "reflect rational decision making and, in particular, a not unreasonable evaluation of the tax-allocation agreement's potentially adverse impact on FTL's performance of its certificate obligations" (Pet. App. 19a).

ARGUMENT

Petitioners contend that the court of appeals erred because it (1) held untimely petitioners' challenge in 1975 to the 1970 Order asserting jurisdiction over the reorganization and requiring Board approval for inter-company transactions; and (2) ruled that the Board's 1973 and 1975 Orders were subject to the "arbitrary or capricious" standard of review rather than the "substantial evidence" standard. Neither issue merits this Court's review on this record.

1. The court of appeals was correct in declining to review the 1970 Order. Section 1006(a) of the Act, 49 U.S.C. 1486(a), is the sole basis for the court of appeals' jurisdiction. It provides that Board orders are subject to review "upon petition, filed within sixty days after the entry of such order * * *," and that "[a]fter the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore."

The statute plainly allows only sixty days within which to challenge an order; it includes no exception, such as petitioners propose (Pet. 14), for an order related to subsequent orders of which timely review is sought. To allow judicial review in the court of appeals after the statutory time limit has expired "would frustrate the congressional purpose, plainly evidenced * * *, to impose a 60-day limitation upon judicial review * * *." *Califano* v. *Sanders*, 430 U.S. 99, 108.

Petitioners can obtain no benefit from the statute's provision that an untimely petition for review may be filed "by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore." They failed to show any reasonable ground for their delay in attacking the Board's 1970 Order. As the court of appeals noted (Pet. App. 8a), petitioners chose in 1970 to accept the Board's conditional approval of their reorganization, with "full acceptance of the conditions" (*ibid.*, n. 12), and to forego seeking review in the court of appeals. For five years following that choice they accepted and enjoyed the benefits of the Board-approved reorganization. This Court has held that a firm whose merger was approved by a regulatory agency on specified conditions "cannot now be allowed to attack an officially approved condition of the merger while retaining at the same time all of its benefits. The impropriety of the attack is rendered twofold because it is not made in the merger proceeding but is attempted in a separate * * * proceeding." *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 502. Accord, *Dan-Air Services, Ltd.* v. *Civil Aeronautics Board*, 475 F. 2d 408, 412 (C.A.D.C.). Having chosen in 1970 not to challenge the Board's order but to accept its benefits, petitioners cannot now claim that their failure to make a timely challenge was based on reasonable grounds.[5]

Petitioners also err in contending (Pet. 13) that the court of appeals should have asserted jurisdiction under *Leedom* v. *Kyne*, 358 U.S. 184. That case involved a certification order of the National Labor Relations Board which, because it was not a final order, was not reviewable in the court of appeals by any available statutory procedure. Because there was "no other means, within their control * * *, to protect and enforce that right" (*id.* at 190; citation omitted), the Court held that employees challenging the order could do so in a *district court* under that court's general jurisdiction, conferred by 28 U.S.C. 1337, over suits arising under acts of Congress regulating commerce. Here, in contrast, the court of appeals had no such independent basis for exercising jurisdiction over petitioners' 1975 challenge to the 1970 Order. Its jurisdiction for direct review of orders of the Civil Aeronautics Board is both created and limited by Section 1006(a) of the Federal Aviation Act (49 U.S.C. 1486(a)). And petitioners here, unlike the

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[5] Petitioners claim (Pet. 15) that their conduct in "foregoing timely review as prescribed by § 1006(a)" was justified by the "economic benefits" of the reorganization. Business convenience, however, is not a reasonable ground for choosing not to seek review within the statutory period.

plaintiffs in *Leedom* v. *Kyne*, had available to them a means to protect and enforce their asserted right in the court of appeals on timely petition for review of the 1970 Order, a means they chose not to invoke.

Similarly unsound is petitioners' contention (Pet. 14-15) that the court of appeals should have entertained their challenge to the 1970 Order because they alleged that the order was beyond the Board's "jurisdiction." Acceptance of this claim would all but eliminate the statute's 60-day limit (and comparable limits in other statutes), denying it force whenever the Board's action is alleged to exceed its statutory authority. Petitioners cite no case countenancing disregard of an express statutory time limit on such a ground. In contrast to petitioners' argument, this Court has recently held that a 60-day statutory limit on judicial review would be impermissibly undercut if a claimant for disability benefits could seek review from the denial of a petition to reopen his claim (*Califano* v. *Sanders*, *supra*, 430 U.S. at 108), and that the failure of the Attorney General of the United States to object to a voting law change within the statutory period of sixty days barred his subsequent objection even when authorized by court order (*Morris* v. *Gressette*, No. 75-1583, decided June 20, 1977, slip op. 11-12).

2. Petitioners also contend (Pet. 8-12) that the court of appeals applied an erroneous standard of review by examining the 1973 and 1975 Orders under the "arbitrary or capricious" standard instead of the "substantial evidence" test. We submit that as ap-

plied to these rulings of the Board, which did not turn on findings of fact, the two standards are not significantly different. Especially since the rulings in this case have now been superseded by an industry-wide regulation imposing similar conditions on tax allocation agreements, there is no need for this Court to review the standard that was applied in this case.

No hearing was requested by petitioners when they submitted their tax allocation agreement to the Board for its approval. No hearing was required by the statute.[6] Under the Administrative Procedure Act, reviewing courts are directed to determine whether agency action is supported by substantial evidence only in cases "subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency

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[6] As the court of appeals noted (Pet. App. 18a, n. 18):

> TI and FTL do not contend that the CAB was statutorily required to hold a hearing on their application for approval of the tax allocation agreement or on their petition for reconsideration. Indeed, the record here precludes such an argument. In 1960, Congress amended section 408 of the Act, 49 U.S.C. § 1378, to permit the CAB, in certain circumstances and pursuant to certain procedures, to dispense with a hearing in cases arising under that section. Act of Sept. 13, 1960, Pub. L. No. 86-758, § 1, 74 Stat. 901, *amending* 49 U.S.C. § 1378(b). In the proceedings leading to the 1970 Order, the CAB, after fully complying with that amendment, dispensed with a hearing. In that Order, the CAB retained jurisdiction to impose, without a hearing, further conditions. Flying Tiger accepted this provision, along with all others in the Order. Under authority of this provision, the CAB then conducted, without a hearing, the proceedings leading to the 1973 and 1975 Orders.

hearing provided by statute" (5 U.S.C. 706(2)(E)).[7] The Administrative Procedure Act thus recognizes a dichotomy between review of agency findings made on a hearing record, where the "substantial evidence" standard applies, and review of agency rulings that do not turn on findings of fact, where the "arbitrary or capricious" standard is applicable (see 5 U.S.C. 706 (2)(A)). This Court has also recognized that dichotomy. In *Camp* v. *Pitts*, 411 U.S. 138, which involved a determination by the Comptroller of the Currency that was not required to be made after a hearing on the record, the Court held that "the proper standard for judicial review of the Comptroller's adjudications is not the 'substantial evidence' test which is appropriate when reviewing findings made on a hearing record," but "[t]he appropriate standard for review was * * * whether the Comptroller's adjudication was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law' * * *." 411 U.S. at 141-142.

Petitioners contend, however, that this dichotomy does not apply to judicial review under the Federal Aviation Act. Because Section 1005(f) of the Act (49 U.S.C. 1485(f)) provides that "[e]very order of * * * the Board shall set forth the findings of fact upon which it is based," and because Section 1006(e) of the Act (49 U.S.C. 1486(e)) provides that "[t]he findings of fact by the Board * * * if supported by

[7] Sections 556 and 557 of 5 U.S.C. concern proceedings required by statute to be determined on the record after an opportunity for an agency hearing.

substantial evidence, shall be conclusive," petitioners argue that the "substantial evidence" test applies whether or not a hearing is conducted on the record and whether or not a ruling of the Board turns on findings of fact. In a case such as this one, petitioners' argument not only would put the Federal Aviation Act at odds with the principles of judicial review recognized by the Administrative Procedure Act and by this Court in *Camp* v. *Pitts* but, as the court of appeals noted (Pet. App. 18a-19a), it would also require evidentiary proceedings where there were no issues of fact to be resolved, where no hearing was requested or held, and where Congress has expressly dispensed with a hearing requirement.[8]

[8] In 1960, Congress amended Section 408(b) of the Federal Aviation Act to permit the Board to dispense with hearings where none had been requested and certain conditions were met. 74 Stat. 901, 49 U.S.C. 1378(b), states:

> Provided further, That, in any case in which the Board determines that the transaction which is the subject of the application does not affect the control of an air carrier directly engaged in the operation of aircraft in air transportation, does not result in creating a monopoly, and does not tend to restrain competition, and determines that no person disclosing a substantial interest then currently is requesting a hearing, the Board, after publication in the Federal Register of notice of the Board's intention to dispose of such application without a hearing (a copy of which notice shall be furnished by the Board to the Attorney General not later than the day following the date of such publication), may determine that the public interest does not require a hearing and by order approve or disapprove such transaction.

As the court of appeals noted, "[t]he primary purpose of the 1960 amendment permitting the CAB to dispense with a

In any event, in the context of this case, where the Board's rulings of 1973 and 1975 did not turn on findings of fact, the two standards of judicial review are not significantly different. By its original 1970 Order subjecting inter-company transactions to Board approval, the Board sought to insure fair treatment for the carrier in the new corporate regime so as to protect against impairment of its financial position and its ability to provide air services (54 CAB at 703). When petitioners in 1973 requested the Board to approve their tax allocation agreement, the Board was required to make a predictive and policy judgment concerning the benefits and risks of the agreement as they affected the carrier's ability to perform its certificate obligations. In making that assessment the Board noted—a fact based on petitioners' own submission and apparently uncontested—that under the agreement the carrier would pay to the holding company, for the years 1971 and 1972, amounts of cash far in excess of the holding company's actual tax liability (Order 73-12-106, App. A, *infra*, p. 2a, n. 3). Given the terms of the agreement, the Board made the judgment that, "[c]onsidering the holding company's interlocking relationships with and its effective control of the air carrier and the other affiliates, it is, in our view, altogether unrealistic to expect that the air carrier or the other affiliates would not be completely responsive to the holding

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hearing in some cases * * * was to facilitate CAB disposition of section 408 cases, not to hinder that process." Pet. App. 19a, n. 20.

company's bidding" (Order 75-2-1, App. B, *infra*, p. 21a). The Board therefore concluded that, "inasmuch as FTL may continue in the foreseeable future to be a principal, if not the primary, source of shelterable income" (Order 73-12-106, App. A, *infra*, p. 4a), it was justified in imposing conditions designed to protect the carrier's ability to perform.

Such a ruling turned essentially on a predictive judgment concerning the benefits and risks of the agreement. Cf. *Frontier Airlines, Inc.* v. *Civil Aeronautics Board*, 439 F. 2d 634, 640 (C.A.D.C.). The Board's decision concerning the conditions necessary to protect the carrier rested "in the final analysis on an essentially legislative policy judgment, rather than a factual determination, concerning the relative risks of underprotection as compared to overprotection." *Industrial Union Department, AFL-CIO* v. *Hodgson*, 499 F. 2d 467, 475 (C.A.D.C.). When a court reviews an administrative determination of this kind, the concepts of "substantial evidence" and not "arbitrary or capricious" tend to converge (*Associated Industries of New York State, Inc.* v. *United States Department of Labor*, 487 F. 2d 342, 349-350 (C.A. 2)), just as they do when general rules adopted after informal rule-making are subject to review. See *Industrial Union Department, AFL-CIO* v. *Hodgson, supra*. Cf. *Island Airlines, Incorporated* v. *Civil Aeronautics Board*, 363 F. 2d 120, 125-126 (C.A. 9). While the two tests are statutorily separate under the Administrative Procedure Act (*Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*,

419 U.S. 281, 284),[9] whether they are actually coterminous in a given case depends on the nature of the determination under review. Some Board actions rest on factual predicates that require support by substantial evidence; other actions involve the kind of policy prediction presented by this case. In the latter situation the only "substantial evidence" that can be examined on review is the presence or absence of a rational basis for the administrative decision.

For these reasons, petitioners err in contending that the ruling below conflicts with decisions of other circuits purporting to apply the substantial evidence test in Board nonhearing cases. See, *e.g.*, *Law Motor Freight, Inc.* v. *Civil Aeronautics Board*, 364 F. 2d 139 (C.A. 1), certiorari denied, 387 U.S. 905; *Nebraska Department of Aeronautics* v. *Civil Aeronautics Board*, 298 F. 2d 286 (C.A. 8); *Pillai* v. *Civil Aeronautics Board*, 485 F. 2d 1018 (C.A.D.C.). Unlike this case, those decisions did not involve Board action consisting essentially of a predictive policy choice.[10]

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[9] In *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, *supra*, the Court applied the "arbitrary or capricious" test to so much of an Interstate Commerce Commission decision, made after a record hearing, as involved a prediction of the burdens and benefits of new competitive service. The supporting factual predicates were concededly sustained by substantial evidence.

[10] As *Bowman Transportation, Inc.*, *supra*, demonstrates (see n. 9, *supra*, pp. 15-16), predictive policy choices must be judged under the "arbitrary or capricious" standard. The language of Sections 1005(f) and 1006(e) of the Act, 49 U.S.C. 1485(f) and 1486(e), quoted *supra*, pp. 12-13, does not compel use of the substantial evidence test in cases to which it would not apply under the Administrative Procedure Act, *i.e.*, cases not involving disputed facts found after a record hearing. It simply means what it says: that the Board's findings of fact shall be conclusive if they are supported by substantial evidence.

Finally, the conditions imposed by the Board's 1973 and 1975 Orders on petitioners' tax allocation agreement have been superseded by similar conditions in the *ACRI* decision which the Board adopted in 1976. *See* pp. 5-6, *supra*. Since petitioners, with other holding companies and their carrier subsidiaries, are challenging the *ACRI* orders before the Court of Appeals for the District of Columbia Circuit (*ibid.*; see Pet. App. 6a, n. 9),[11] there is no need for the Court to consider this case now.

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[11] As the court of appeals noted (Pet. App. 6a, n. 9), the *ACRI* orders do not moot the instant case. The *ACRI* orders were adopted in May 1976 and are prospective only. Therefore, they do not control petitioners' tax allocation practices for the two and one-half year period between adoption of the 1973 conditions and the *ACRI* orders.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1977.

APPENDIX A

Order 73-12-106

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

Adopted by the Civil Aeronautics Board at its office in Washington, D.C. on the 26th day of December, 1973

Docket 21223

[Served Dec. 27, 1973]

Application of

THE FLYING TIGER LINE INC. AND
THE FLYING TIGER CORPORATION

for approval of a tax allocation agreement under paragraph 3 of Order 70-6-119.

ORDER APPROVING AGREEMENT

The Flying Tiger Line Inc. (FTL) and The Flying Tiger Corporation, (FTC) request modification of paragraph 3 of Order 70-6-119,[1] adopted May 5, 1970, to the extent necessary to permit implementation of a tax allocation agreement effective with respect to taxable years 1971 and 1972, as well as prospectively.

[1] Order 70-6-119, May 5, 1970, approved the initial reorganization resulting in the formation of FTL's holding company parent, FTC. Ordering paragraph 3 thereof prohibited transactions between FTL and FTC aggregately amounting to $100,000 or more, absent prior Board approval.

The agreement would treat the air carrier, for tax purposes, as if it were otherwise unaffiliated. Thus, the airline would pay to the holding company any tax that would have been due were it filing returns as an independent company, and would receive a refund were it so entitled to one as a separate company.

Under circumstances where net operating losses, investment tax credits or other tax credits generated by FTL's operations are applied in computing payment of taxes otherwise due from operations of its affiliates FTL will immediately receive in cash the value of the taxes saved.[2] Other subsidiaries of FTC are only entitled to receive a credit rather than cash under circumstances where they have contributed tax credits or operating losses to reduce or eliminate overall tax liability.[3]

No comments have been received.

After consideration, we have determined to approve the tax plan, subject to exceptions and conditions. Generally, we are satisfied that certain possibilities otherwise adverse to the carrier's interests are absent: no penalties will accrue to the air carrier by virtue of its inclusion in the consolidated tax agreement; the carrier will receive fair treatment with

[2] Applicants reserve the right to adopt a different standard at a later date should it then appear that FTL would have tax credits or operating losses which it otherwise would not be able to use.

[3] Upon approval of this agreement, FTL would pay to the holding company $7.61 million representing its 1971 and 1972 independent tax liability. The group as a whole paid no taxes in 1971 and only $1.2 million in 1972.

respect to the use of its tax credits and loss carryforwards and carrybacks; and the implementation of the agreement will have no direct adverse impact on the carrier, inasmuch as Flying Tiger Line will in no event pay more to the holding company than it would pay to the government as an independent entity. Additionally, the agreement should in fact result in certain benefits by allowing the air carrier to realize an immediate cash payment for any tax credits or net operating loss used by the holding company which would not otherwise have accrued to the air carrier until some future year.

As submitted, the agreement would provide a further benefit to the air carrier, inasmuch as tax benefits generated by any member would not be lost through that member's inability to utilize them within a given statutory period to the extent that such benefits had been previously applied by the holding company parent in computing the consolidated return. However, inasmuch as applicants specifically reserve the right to modify the agreement should Flying Tiger Line be in a position to so benefit, this advantage will not likely accrue to the air carrier.

On the other hand, one aspect of the agreement poses some difficulty. Under the agreement, the air carrier will be required to pay the amount of its independent tax liability to the holding company parent regardless of whether the holding company's consolidated tax return requires the payment of taxes to the Government. To the extent cash payments by the air carrier exceed the group's consolidated tax

liability, the holding company would have the use of such funds until the generation of operating profits by the other subsidiaries requires expenditure of the funds in payment of tax liabilities attributable to those subsidiaries, and payable on their behalf by the holding company pursuant to the agreement.

In this respect, we will impose an alternative format, which would effect no different impact on other subsidiaries of the holding company, but which would provide that the air carrier—rather than the holding company—benefit from the use of the air carrier's sheltered income pending any required expenditure of such funds on behalf of the other affiliates. Particularly, we will require that the air carrier itself retain possession of its sheltered profits, rather than turning them over to the holding company; the air carrier might allow a credit to affiliates contributing to the shelter, as would the holding company pursuant to the instant agreement, and might subsequently pay tax contributions on behalf of contributing affiliates should any such affiliate subsequently be in a position to have applied its contributed tax benefits as an independent entity.

We believe such an alternative plan to be more in the interests of the air carrier than the instant one, and to be equitable to the holding company and to each affiliate. This is especially true inasmuch as FTL may continue in the foreseeable future to be a principal, if not the primary, source of shelterable income.

The effect of our modification will be to permit FTL to contribute, with other affiliates, a proportionate share of the group's consolidated tax liability, and to issue credits to the affiliates whose losses and tax credits were utilized to shelter the air carrier's taxable income. Contributions by the air carrier to the group's consolidated tax liability should be no more than the sum of (a) an amount proportionate to the air carrier's independent tax liability in relation to the independent tax liability of all members of the group showing a taxable income, and (b) an amount required to redeem credits given by the air carrier to other subsidiaries in prior years.[3[sic]] The tax proposal should be modified accordingly and the revised tax plan should be forwarded to the Board in this docket.[4]

To insure the Board's ability to monitor the subsequent action of applicants pursuant to approval herein granted, we will require applicants to file with the Board a copy of their consolidated tax return for every year in which this proposal is effectively employed, as well as workpapers for each such year

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[3[sic]] The Appendix provides an illustration of the proper application of this formula.

[4] Approval of the tax plan pursuant to condition 3 of Order 70-6-119 is necessarily a temporary measure, to be superceded by our decision in the *Air Carrier Reorganization Investigation* and any resulting implementation of tax review standards. Approval herein granted will extend to years 1971, 1972 and to any subsequent year for which a consolidated return is filed prior to our final action in the *Air Carrier Reorganization Investigation*.

indicating the steps employed to reach the ultimate allocation of cash payment and credits given.[5] The workpapers should at minimum set forth—for the holding company and for each subsidiary—separate taxable income (or losses) both before and after adjustments, total tax credits (by type) and losses generated for the year, total credits and losses carried forward from the prior year, estimated independent tax liability, total credits given by one subsidiary to another, total cash contribution with respect to the group's consolidated tax liability, and the manner of application of the foregoing items in the computation of the current consolidated tax return. The Board should be promptly apprised of subsequent adjustments of the consolidated return.[6]

The current tax proposal, as written, will in most cases adequately protect the air carrier in the event the holding company parent opts to revert to filing of individual tax returns. However, inasmuch as the agreement does not purport to provide for every contingency which might arise in the event of such reversion, we will require prior Board approval of any termination of the agreement. Moreover, to insure continued fair treatment to the air carrier respecting

[5] The filing of a consolidated tax return for calendar 1971 will not be required to the extent it is currently on file with the Board, provided that any adjustments in the 1971 consolidated returns be brought to the Board's attention. However, workpapers for 1971 will be required.

[6] Of course, the applicants will be given confidential treatment with respect to this information.

tax returns, we will require prior Board approval of any subsequent modification of the tax agreement,[7] provided, however, that such prior approval shall not be required with respect to specific changes to be made pursuant to the modifications imposed herein.[8]

ACCORDINGLY, IT IS ORDERED THAT:

The subject tax proposal be and it hereby is approved pursuant to ordering paragraph 3 of Order 70-6-119, subject to the following:[9]

a. the terms of the agreement shall be modified to provide that the air carrier shall retain the use of its sheltered income, subject to (a) proportionate contributions to the group's consolidated tax liability, and (b) redemption of credits issued in prior years by the air carrier to its affiliates, both as discussed in the body of this order;

[7] This condition is particularly required since the holding company parent reserves the right to adopt a different standard at a later date should FTL appear unable to utilize, as an independent entity, the tax benefits it generates. At the time of any such modification, it will be necessary to assure that Flying Tiger Line participates in any tax savings from its inclusion in the consolidated return.

[8] Payment and credit transactions hereby approved shall not be included in calculating the $100,000 figure which triggers the prior-approval requirement of Order 70-6-119, ordering paragraph 3.

[9] The payment and credit transactions authorized by this paragraph shall not be included in calculating the $100,000 figure which triggers the prior approval requirement of Order 70-6-119, ordering paragraph 3.

b. the parties shall neither terminate nor modify the terms of the tax agreement without prior Board approval, provided, however, that such prior Board approval shall not be required with respect to changes required in accordance with paragraph (a) above;

c. for each year in which this proposal is applicable, including 1971 and 1972, applicants shall file workpapers described in the body of this order; and for each year during which the agreement is applicable, beginning 1972, applicants shall file a copy of their consolidated tax return;

d. The approval granted herein shall be subject to modification, revocation, or attachment of further or different conditions as the Board may, without hearing, find appropriate in the public interest; and

e. The approval granted herein shall not in any manner be relied upon by FTL for ratemaking or other regulatory purposes not specifically considered herein.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND
Secretary

[SEAL]

APPENDIX

Year 1	Air Carrier	Co. A	Co. B	Co. C	Consolidated Return
Income	1,000	2,000	3,000	4,000	10,000
Tax Liability *	500	1,000	1,500	2,000	5,000
Contributed to Consolidated tax liability	500	1,000	1,500	2,000	5,000
Year 2					
Income	1,000	(4,000)	3,000	4,000	4,000
Tax Liability *	500	(2,000) **	1,500	2,000	2,000
Contributed to Consolidated tax liability:					
Independent tax liability	500	—	1,500	2,000	
Less Credit to Co. A	(250)	2,000	(750)	(1,000)	
Total contribution	250	—0—	750	1,000	2,000
Year 3					
Income	1,000	2,000	3,000	4,000	10,000
Tax Liability *	500	1,000	1,500	2,000	5,000
Contribution to Consolidated tax liabiltiy:					
Independent tax liability	500	1,000	1,500	2,000	
Redeem credits given in prior year	125	(1,000)	375	500	
	625	—0—	1,875	2,500	5,000

In Years 1 and 2, the air carrier contributions to the group's consolidated tax liability are in an amount proportionate to the air carrier's independent tax liability in relation to the independent tax liability of all members of the group showing a taxable income. In Year 2, however, the air carrier also credits Co. A for the use of Co. A's tax losses, the amount of the credit given being calculated in the same ratio used

* Assumes a tax rate of 50%

** Tax effect of loss

to determine the air carrier's contribution to consolidated tax liability.

In Year 3, the air carrier again contributes its proportionate share of consolidated tax liability, as calculated on the total taxable income of all members showing a profit. However, it makes an additional cash payment on behalf of Co. A to redeem a proportionate share of credits given to Co. A in the prior year, relative to the amount of total available credits which Co. A can utilize to offset its income for the year.

At the end of Year 3, the air carrier would still have outstanding $125 in credits due Co. A, to be proportionately contributed on that company's behalf to the extent that Co. A is able to call upon them in future years.

APPENDIX B

Docket 21223 Order 75-2-1

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D.C.

[Emblem]

THE FLYING TIGER LINE INC.
CONTROL RELATIONSHIPS: INTERCOMPANY
TAX ALLOCATION

Docket 21223

[Served February 4, 1975]

Order 75-2-1

Adopted by the Civil Aeronautics Board
at its office in Washington, D.C.
on the 3rd day of February, 1975

Application of The Flying Tiger Line Inc. and Tiger International, Inc. (formerly The Flying Tiger Corporation), for approval of a tax allocation agreement under paragraph 3 of order 70-6-119, as amended

Order Denying Petition for Reconsideration

By order 73-12-106, December 26, 1973, the Board approved, subject to various conditions and modifications, a tax allocation agreement among The Flying

Tiger Line Inc. (FTL), The Flying Tiger Corporation (FTC), now known as Tiger International, Inc. (TI), and their affiliates, filed pursuant to paragraph 3 of order 70-6-119, dated May 5, 1970, as amended.[1] The proposed agreement[2] was approved subject, *inter alia,* to a condition modifying the proposed utilization of tax savings resulting from the filing of a consolidated tax return by the TI system of affiliated companies.[3]

[1] Order 70-6-119, amended by order 71-7-6, July 1, 1971 and order 72-2-6, Feb. 2, 1972, *inter alia,* prohibited intercompany transactions within the TI system of subsidiaries and affiliated companies which amount in the aggregate to $100,000 or more in any calendar year without prior Board approval. Subsequent to its decision in this proceeding, the Board by order 74-5-90, May 17, 1974 increased the dollar limitation to $1 million.

[2] The agreement treated the air carrier, FTL, for tax purposes as if it were otherwise unaffiliated. It provided that the air carrier would pay to TI, the holding company, any tax that would have been due were it filing returns as an independent company, and would receive a refund were it entitled to one as a separate company. It further provided that under circumstances where net operating losses, investment tax credits, or other tax credits generated by FTL's operations are applied in computing payment of taxes otherwise due from operations of the TI group, FTL would immediately receive in cash the value of the taxes saved. Under comparable circumstances, other subsidiaries of TI would be entitled to receive redeemable credits from TI.

[3] The Board stated that contributions by the air carrier to the group's consolidated tax liability should be no more than the sum of (a) an amount proportionate to the air carrier's independent tax liability in relation to the independent tax liability of all members of the group showing a taxable income, and (b) an amount required to redeem credits given by the

TI and its wholly owned subsidiary, FTL, filed a timely petition for reconsideration of order 73-12-106, containing a request to present oral argument before the Board.[4]

Petitioners contend, in effect, that the modification of the original tax allocation agreement is inconsistent with the Board's policy and practice and would prevent petitioners and their affiliates from conducting business effectively and efficiently as a holding company group.

In support of their contentions, petitioners state, *inter alia,* that the Board has consistently recognized that tax allocation is a necessary concomitant of consolidated tax reporting, and generally has had only two concerns: (1) that an air carrier within a corporate group not be assessed an amount greater than its independent tax liability would have been had it reported on a separate basis, and (2) that an air carrier be given immediate credit for the utilization by affiliates of its losses, credits, and deductions in lowering overall taxes. As a basis for their position that the Board's concern is so limited, petitioners refer to Part 241 of the Board's Economic Regulations, to order 69-7-102, July 15, 1969, involving the acquisition of Air West by Hughes Tool Company, and to the decision of the Administrative Law Judge (Au-

air carrier to other subsidiaries in prior years, and ordered that, subject to these conditions, FTL shall retain the use of its sheltered income.

[4] Petitioners' contentions are set forth and amply discussed in their filing, and we find that no useful purpose would be served by oral argument.

gust 27, 1973) in the *Air Carrier Reorganization Investigation* (docket 24283 *et al.*).[5]

Petitioners cite and appear to rely, at least in part, upon Part 241 of the Board's Economic Regulations[6] as amended by ER-707 on September 22, 1971, effective on January 1, 1972.[7] We find no inconsistency between the recordkeeping and reporting requirements of Part 241 and our decision in order 73-12-106.

Part 241 was designed to provide for a uniform system of accounts and reports, requiring that all certificated air carriers record their accounts and make reports to the Board uniformly in accordance with this system. ER-707 was designed to provide more complete disclosures of transactions within affiliated groups of companies, and to set forth standards in accounting for such transactions. Applying the general objectives of this amendment, section 2-18(d) prescribes a method for recording income taxes of a regulated air carrier holding a certificate of public convenience and necessity and of companies affiliated with it.[8]

[5] The Reorganization Investigation is presently before the Board for review.

[6] Part 241—Uniform System of Accounts and Reports for Certificated Air Carriers (14 CFR 241).

[7] The Board gave notice that it had the amendment under consideration by circulation of EDR-187, dated Sept. 9, 1970 (docket 22546) and published at 35 F.R. 14464.

[8] Sec. 2-18(d) provides as follows:

"(d) Income taxes shall be allocated among the transport entities of the air carrier, its nontransport divisions, and members of an affiliated group. Under circumstances in which income taxes are determined on a consolidated basis by an air carrier and other mmebers of an affiliated group, the income tax expense to be recorded by the air carrier shall be the same as would result if determined for the air carrier separately for all time periods, except that the tax effect of carryback and carryforward operating losses, investment tax credits, or other tax credits generated by operations of the air carrier shall be recorded by the air carrier during the period in which applied in settlement of the taxes othewise attributable to any member, or combination of mmebers, of the affiliated group. Any difference between the income tax so recorded and the amount at which settlement is to be made shall be recorded in subaccount 88.1 Intercompany Transactions Adjustment—Credit or in subaccount 89.1 Intercompany Transactions Adjustment—Debit, as is appropriate."

The language of section 2-18(d), together with the history of its promulgation, like that of Part 241 in its entirety, clearly indicates that the rule and its amendments merely establish recordkeeping and reporting procedures and methods in order to provide the Board with more complete disclosures of transactions within affiliated groups of companies. The method prescribed by section 2-18(d) for recording income taxes on a consolidated basis requires only that the income tax expense to be recorded by the air carrier shall be the same as would result if determined for the air carrier separately for all time periods, and that the tax effect of carryback, carryforward operating losses, investment tax credits, and other tax credits generated by the air carrier shall be recorded by the air carrier during the period in which applied in settlement of the consolidated tax liability. The recordkeeping and reporting requirements of section

2-18(d) are by no means declaratory of Board policy with respect to particular intercompany agreements relating to the subject matter of the reporting, and in our view do not pertain to or focus upon the issue raised in this petition, viz, the allocation of tax savings pursuant to an agreement between a certificated air carrier and its affiliates. Moreover, to the extent that section 2-18(d) may be considered as bearing, however remotely, upon any Board policy or practice with respect to such issues, we find no inconsistency with our decision in order 73-12-106. Further, we are unable to conclude that our decision in order 73-12-106 is harmful to the financial integrity of the air carrier, FTL, or more disadvantageous to the air carrier than the tax allocation guidelines contained in the decision of the Administrative Law Judge in the *Air Carrier Reorganization Investigation* referred to by petitioners.[9]

Petitioners also suggest that the continued adherence to Board order 73-12-106 would not be in accord with Board policy and practice as established by Board precedent. However, petitioners acknowledge that, about 1 month prior to order 73-12-106, presently under reconsideration, the Board had adopted, in order 73-11-8, October 23, 1973[10] a similar tax

[9] However, we wish to stress that our action herein should not be regarded as prejudging in any way our final determination on the merits of any issue in the Reorganization Investigation.

[10] This order involved an application filed by Braniff Airways, Incorporated, and Braniff International Corporation in docket 24048.

allocation policy. The tax allocation requirement in that case, which permitted no retention of consolidated income tax savings by the parent holding company, Braniff International Corporation (BIC), was imposed as a condition to the Board's approval of a reorganization plan involving Braniff Airways' formation of BIC, similar to FTL's formation of FTC.[11]

Other cases cited by petitioners do not involve instances of Board approval of an air carrier's formation of a holding company,[12] and are not otherwise inconsistent with the tax allocation determination in the *Braniff* case or in order 73-12-106, under reconsideration herein.

In *Ling-Temco-Vought, Inc., Control of Braniff*, order E-25989, November 17, 1967, the issue of income tax allocation was neither presented to nor determined by the Board. We are not disposed to view the Board's inaction with respect to this issue at that time as a determination of Board policy with respect thereto.

In the *Acquisition of Air West, Inc., by Hughes Tool Company*, order 69-7-102, July 15, 1969, the Board imposed a condition on its approval of the ac-

[11] Order 70-6-119, *supra*.

[12] United Air Lines, Inc., order 69-4-67, Feb. 17, 1969, also involved an air carrier's formation of a holding company, UAL, Inc. However, that proceeding antedated P.L. 91-62 (Aug. 20, 1969, effective on Aug. 5, 1969), which amended, *inter alia*, sec. 408 of the Act (see order 70-6-119, *supra*). Since the Board was then not empowered to assert jurisdiction over the reorganization, and did in fact disclaim jurisdiction, it imposed no conditions.

quisition which provided, *inter alia*, that "In no event shall the tax burden or relief related to the air carrier division (Air West Division of Hughes Tool Company) be less favorable to that division as part of Hughes Tool Company than would have been the case had the division been taxed as a separate corporation." Thus, the Board expressly established at once both a *ceiling* of tax burden and a *floor* of tax relief for an air carrier division of an operating company, and implicitly recognized the same parameters for an air carrier subsidiary of such company (order 69-12-66, November 26, 1969). Not inconsistently therewith, by order 73-12-106 we made a determintaion which focused on the intervening area with respect to a consolidated income tax allocation agreement between an air carrier-formed holding company and the air carrier subsidiary. In these circumstances, we do not find that determination, even though it may result in tax relief to the air carrier above the minimum requirement, to be contrary to established Board precedent, disadvantageous to the air carrier, or as imposing an undue tax burden on the air carrier-formed holding company.[13]

Petitioners advance several contentions aimed at demonstrating adverse consequences of the Board's

[13] We reiterate, as stated in footnote 9 *supra*, that our action herein should not be regarded as prejudging in any way our final determination on the merits of the issues in the Air Carrier Reorganization Investigation, the scope of which is limited to air carrier-formed holding companies (order 74-6-18, June 4, 1974) and includes United Air Lines, Inc., as well as Braniff and FTL as parties.

decision in order 73-12-106. First, petitioners state that this decision frustrates national tax policy in that petitioners and their affiliates, North American Car Corporation (NAC), are deprived of tax benefits, such as accelerated depreciation and investment tax credits. It is perfectly obvious that insofar as the petitioner, FTL, is concerned order 73-12-106 deprives the air carrier of no tax benefits whatsoever. Indeed, it appears that the thrust of petitioners' complaint is that FTL is acquiring more than its share of combined group tax savings. With regard to NAC and other subsidiaries of TI, we believe that the availability to them of redeemable tax credits, as provided in order 73-12-196, implements rather than frustrates national tax policy.[14] As to TI, there is no contention that the parent holding company generated any part of the total tax savings, and for this reason, as in the Braniff case, we perceive no inequity to the holding company parent of FTL. To the contrary, as a consequence of our decision in order 73-12-106, TI could share in the total tax benefits arising from the combined tax reporting through the availability of FTL's immediate tax benefits (and other tax savings lodged with FTL) for the payment of dividends in accordance with paragraph 3(b) of order 74-5-90, May 17, 1974.[15]

[14] TI's subsidiary, NAC, for example, will have available to it no lesser tax benefits than it would have received had it filed its income tax return as a separate entity.

[15] This paragraph, further amending order 70-6-119, as previously amended by orders 71-7-6 and 72-2-6, provides as follows:

Second, petitioners contend that order 73-12-106 makes it impossible for TI to function as a holding company. However, petitioners acknowledge that the holding company does not rely exclusively upon the utilization of tax savings from consolidated tax returns as a means of assuring the availability of funds for investment in its nonairline subsidiaries. Indeed, as discussed above, the tax savings lodged with FTL could in some circumstances make available to the holding company an increased dividend distribution with which to further its investment policies.

Third, petitioners contend that tax savings, if lodged with the holding company, could be better utilized in the latter's discretion for investment in its subsidiaries "as needed" than by FTL. We regard this contention as highly speculative, and it may entail a distribution of tax savings to affiliates without

"3(b). FTL shall make no payment of dividends on its common stock without prior Board approval, except with respect to dividend payments for any given calendar year which are paid out of retained earnings in an aggregate amount not in excess of 50 percent of its net income after special items (line 9799 on CAB Form 41 Schedule P-1.2), as determined in accordance with Part 241 of the Board's Economic Regulations (the Uniform System of Accounts), for the calendar year immediately prior thereto, provided that verification of compliance with this requirement, in a manner acceptable to the Bureau of Accounts and Statistics, is made by FTL within 90 days of the end of the calendar year for which such dividend payments have been made, setting forth, *inter alia*, the amount of retained earnings, net income, and percentage basis for the payment of such dividends; * * *"

any relationship to their respective contributions to the combined tax savings.

Petitioners have offered, as an alternative to our decision in order 73-12-106, to accept an allocation agreement which would provide that tax allocation payments by FTL or other affiliates to TI be made discretionary, rather than mandatory as originally agreed upon. This proposal is entirely illusory. Considering the holding company's interlocking relationships with and its effective control of the air carrier and the other affiliates, it is, in our view, altogether unrealistic to expect that the air carrier or the other affiliates will not be completely responsive to the holding company's bidding.

In view of the foregoing and in light of the countervailing considerations for preserving the integrity of the air carrier against inroads by TI in favor of nonair carrier investments, we find, on balance, that any alteration of our decision in order 73-12-106 would not be warranted.

ACCORDINGLY, IT IS ORDERED THAT:

1. Petitioners' request for reconsideration of order 73-12-106 be and it hereby is denied; [16] and

[16] The payment and credit transactions authorized by order 73-12-106 shall not be included in calculating the monetary limitation figure which triggers the prior-approval requirement of order 70-6-119, ordering paragraph 3, as amended. However, it is expected that within 90 days after the filing of any consolidated Federal income tax return by TI which includes FTL, FTL shall file with the Bureau of Operating Rights a statement setting forth (a) the amount of tax paid

2. All other motions and requests herein be and they hereby are denied.

By the Civil Aeronautics Board:

EDWIN Z. HOLLAND
Secretary

[SEAL]

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by FTL in connection with the filing of such consolidated Federal income tax return and (b) the amount of tax that would have been paid by FTL if it had filed separate tax returns for the periods it was included in the consolidated Federal income tax return of TI. (See order 73-11-8).

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